IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 485.

RUSSELL MOTOR CAR COMPANY,
Appellant,

vs.

UNITED STATES,
Respondent.

APPEAL FROM COURT OF CLAIMS.
BRIEF FOR APPELLANT.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Statement of Case.

This proceeding was started in the Court of Claims by the filing of a petition on September 14, 1920. The amended petition, under which the evidence was taken, and under which the case was tried and decided, was filed in the Court of Claims on November 20, 1920. The case was argued before and submitted to the Court of Claim on May 24, 1922. On June 26, 1922, the Findings of Fact and Conclusions of Law of the Court of Claims were entered, whereby judgment was directed in

favor of claimant-appellant and against the United States for a balance due claimant in the sum of $161,614.58.

We will refer to the plaintiff-appellant as claimant in this brief.

The claimant's petition sets forth an action to recover $1,321,457.80 less $243,820.00 paid on account, leaving $1,077,637.80 as a balance due from the United States for goods sold, work done and damages, growing out of the refusal of the United States to carry out a written contract, dated May 14, 1918, which had been entered into in its behalf by the then acting Secretary of the Navy for the manufacture of 250 anti-aircraft gun mounts and sights by the claimant herein at a price of $7,860.00 each (pp. 1-8).

By letter dated November 23, 1918, T. A. Kearney, Acting Chief of the Bureau of Ordnance, Navy Department, advised the claimant that the Secretary of the Navy having authorized cancellation of the company's contract, the claimant was thereby directed to cease all work in connection with said contract not later than December 2, 1918 (p. 125).

The Navy Department, as purported just compensation for its cancellation of the contract above mentioned, awarded and offered the claimant company the sum of $495,250.34 (p. 126). The claim-

ant rejected this offer and the above action was instituted in the Court of Claims. Prior to the institution of the action, payments aggregating $243,820.00 had been made to claimant by the United States (being 80% of the work done under progress invoices) (pp. 5, 6, 129). Thereafter, during the pendency of this action in the Court of Claims, the Navy Department attempted to amend or reduce its former award for just compensation as fixed above at $495,250.34 to the sum of $444,847.68 (p. 127). Upon the basis of this last stated sum the United States paid the claimant, and the claimant received without prejudice or waiving any rights (p. 127), the additional sum of $89,815.76, which, with the $243,820.00 already paid, constituted 75% of the said reduced sum of $444,847.68 fixed by the Navy Department after the institution of this proceeding, as the award to which claimant was entitled (p. 127). The Court of Claims, however, found that the claimant was entitled to receive as just compensation $495,250.34, the same amount fixed as just compensation by the Secretary of the Navy prior to the institution of the suit, and entered judgment in claimant's favor for $161,614.58, the unpaid balance of the amount so determined by the Court of Claims. ($495,250.34 less $333,635.76 paid, equals $161,614.58). (p. 131).

The claimant applied for leave to appeal to this Court from the judgment so rendered. The appeal was allowed by the Court of Claims on July 12, 1922 (p. 145).

The written contract upon which this action is based, contains no clause authorizing its cancellation on the part of either party. (pp. 13-20, 120).

The Court of Claims found that the claimant was ready, able and willing to carry out the contract and manufacture the 250 gun mounts and sights at the time the Navy Department directed the claimant to cease its performance and purported to cancel the contract. The Court of Claims in its award for damages only allowed the claimant recovery for materials furnished and work and labor done up to the date on which the defendant refused to proceed with the contract. Indicating its position on this matter, the Court of Claims, among other things, stated in its opinion:

> "* * * Having awarded the plaintiff full compensation for all damages accruing up to the time and by reason of the cancellation of the contract is it required that there shall be added thereto the profit anticipated from the performance of the contract upon the same basis as if the cancellation were not a matter of right? * * * * At that point, as by a distinct line of demarcation, the future is separated from the past and adjustment of rights on the basis of just compensation to the contractor has its proper field of operation behind and not beyond that line."

The Findings of Fact, Conclusion of Law, and opinion of the Court of Claims, excluded from the sum awarded to the claimant as balance due, any

amount or sum by way of damage, compensation or profit that accrued or might accrue to it by virtue of the work that it was entitled to perform under the contract after the date of the notice from the Navy Department of November 23, 1918, directing the cessation of further work under said contract (pp. 130, 131; Findings of Fact XV and XVI, and Conclusion of Law).

Indeed there was also excluded any allowance for 25 gun mounts and sights that claimant had made and could have delivered on the date of cancellation under circumstances later discussed herein (pp. 126, 130, 141).

Specification of Errors.

1. The Court of Claims erred as a matter of law in not including in the judgment various undisputed legal elements of damages and compensation to which claimant was and is entitled, including the fixed, certain and non-speculative profit which it would have made according to the Court's Findings of Fact, based upon the difference between the contract price and the full cost of performance thereof to the claimant (pp. 130, 131).

2. The Court of Claims erred in holding as a matter of law, that the Act of Congress of June 15, 1917, (40 Stat. 182) regulated, applied to or authorized the cancellation of claimant's contract (pp. 130, 131, 133, *et seq.*).

3. The Court of Claims erred in finding as a matter of law and fact, that the sum of $495,250.34 was just compensation to the claimant for the cancellation of its contract, in that it also specifically found as a matter of fact that this said sum did not include the sum of $726,120.15, and in refusing to find as a matter of law that claimant was entitled to said last mentioned sum or any part thereof as damages as a matter of law, being the profits which the Court of Claims found as a fact claimant would have made if it had been allowed to complete contract, based upon the difference between the contract price and its full performance of the same (pp. 130, 131).

4. The Court of Claims erred in failing to find that the just compensation, whether as stated in the Act of June 15, 1917, or otherwise, did not and does not legally entitle the claimant to have included in the judgment its legal damages, to wit, an amount for its profits, based upon the difference in the contract price and the cost of the full performance thereof by claimant, being [as found as a fact by the Court of Claims] in addition to the sum of $495,250.34, the further sum of $726,120.15 (pp. 130, 131).

5. The Court of Claims erred in finding its judgment in favor of the claimant in only the sum of $161,614.58, which said last mentioned sum concededly did not include or make any allowance for any damages or profits after the United States

refused to proceed further under the contract and directed the claimant to cease all work thereunder. (pp. 130, 131).

6. The Court of Claims erred in not increasing its said judgment of the sum of $161,614.58 by adding thereto and including therein the further sum of $726,120.15, or any part thereof (p. 131).

7. Without waiving the errors above specified, the Court of Claims erred, in any event, in not increasing its judgment and including therein the damages and just compensation, to wit, the profit on 25 gun mounts and sights, being the sum of $96,041.50, which said 25 gun mounts and sights claimant was ready, willing and able to deliver in October and November, 1918, and prior to the purported cancellation of claimant's contract in communication of Navy Department, dated November 23, 1918 (pp. 124, 130, 131, 141).

8. Without waiving the errors above specified, the Court of Claims erred in not including in its judgment the $161,614.58, the further sum of $96,041.50 being found as a fact as the profit on 25 gun mounts which claimant was ready, able and willing to deliver in October and November, 1918, and prior to the purported cancellation of its contract by communication from the Navy Department, dated November 23, 1918 (pp. 124, 130, 131, 141).

9. The Court of Claims erred as a matter of law on the facts found, in adjudging that the claimant was only entitled to the sum of $161,614.58, and not including therein the damages that the claimant, who was ready, able and willing to carry out the contract in its entirety, sustained by reason of the acts of the Navy Department in purporting to cancel its contract and refusing to carry out the same, thereby depriving the claimant of its damages recognized by law based upon the difference between the contract price and the cost of full performance of the same by the claimant, which, concededly, in this case, as found by the Court of claims, would entitle the claimant to have the said judgment of the Court of Claims increased by the sum of $726,120.15, lawful damages and compensation to which it is legally entitled (p. 131).

10. The Court of Claims erred in its judgment in the rule of damages adopted upon the undisputed findings of fact and thereby deprived claimant of its property without due process of law, and also without just compensation in violation of the fifth amendment to the Constitution of the United States.

Statement of Facts.

In the early part of the war and during 1915, 1916, and 1917, the Russell Motor Car Company, Ltd., a Canadian corporation, not the claimant

herein, became extensively engaged in the manufacture of munitions for the British Government. It employed about 6,000 men and was officered by and employed, in responsible positions, men of ability and skill, and had built up a highly efficient organization (p. 120).

Officers of the United States seeking for suitable persons to undertake the manufacture of further gun mounts, conferred with the president of a concern then engaged in that line of work for the Government, and he recommended the Canadian company referred to, and it was invited to submit a bid, which it did in competition. Its bid was acceptable, but the fact that it was a Canadian corporation led to some discussion, resulting in the conclusion by the bidder to incorporate a company in the United States and erect a plant for this work. The claimant company was thereupon and in or about the month of October, 1917, incorporated under the laws of the State of Delaware with a capital stock of $2,500,000, all of which was paid in, and a large part of which was subscribed by the Canadian corporation (p. 121). In the month of November, 1917, the claimant entered into a contract, dated November 3, 1917, with the United States, represented by F. D. Roosevelt, Acting Secretary of the Navy, whereby it undertook to make and deliver 400 3" anti-aircraft gun mounts complete with sights, except telescopes, at a price of $8,462.00 each, the contract having de-

partment number 949, together with the specifications attached thereto. This is not the contract involved in this case. This contract 949 was amended by the Government to provide for 260 mounts with sights, and 140 mounts without sights, all of which were duly made and delivered by the plaintiff. The contract requirements were complied with, and the gun mounts and sights were accepted by the United States and paid for in full without any deduction for delay or otherwise (pp. 120, 124).

The claimant corporation in the fall of 1917, after the making of this contract 949, acquired and purchased a large plant in the City of Buffalo, N. Y., and immediately provided the nucleus of the organization, manufacturing, purchasing, executive, accounting and cost keeping, made up of men who had been trained in the manufacture of munitions, and who, for the most part, had carried on the munition manufacturing program for the said above described Russell Motor Car Company, Ltd., of Canada. The time from November, 1917, to March, 1918, was occupied in the work of installing machinery, equipping the plant, and designing and manufacturing jigs, tools and fixtures which were necessary for the accurate production of the gun mounts and sights involved. About March, 1918, actual work on the material for these gun mounts and sights, required under the first contract above mentioned, was begun, the Navy maintaining inspectors in the plant and

keeping in constant touch with the progress of the work and the quality and accuracy of the workmanship under both contracts (p. 121).

In the month of May, 1918, the claimant entered into a written contract (this is the contract upon which this suit is based), dated May 14, 1918, with the United States, represented by F. D. Roosevelt, Acting Secretary of the Navy, whereby it undertook to make and deliver 250 3" anti-aircraft gun mounts complete with sights, (except telescopes), at the agreed price of $7,860.00 each. Delivery of the mounts was required under the contract within the following stipulated periods:

15 mounts on or before October 31, 1918, and additional mounts as follows:
15 before November 30, 1918,
20 before December 31, 1918,
25 before January 31, 1919,
60 before February 28, 1919,
60 before March 31, 1919,
60 before April 30, 1919.

(p. 119. The contract in full is Exhibit A, annexed to complaint. p. 120, pp. 123-31.)

Contract 949, the first contract entered into in November, 1917, for 400 anti-aircraft gun mounts and sights, covered the manufacture of gun mounts of the same kind, character and quality as those provided for in contract 1498, the one involved in this appeal, the only difference in the terms and specifications of the two contracts being those relating to the price of the gun mounts and sights to be delivered thereunder, as well as

the quantity of gun mounts and sights to be manufactured and delivered and the delivery dates thereof (p. 120). The time for delivery of the gun mounts under contract 949 was as follows:

25 before June 15, 1918,
40 before July 15, 1918,
50 before August 15, 1918,
50 before September 15, 1918,
50 before October 15, 1918,
50 before November 15, 1918,
60 before December 15, 1918,
60 before January 15, 1919. [p. 120].

By mutual arrangement between the claimant and the defendant, and based upon no fault of claimant, the time and schedule for the deliveries of the gun mounts under the two contracts were amended and changed. This was brought about by the following correspondence:

"Sept. 19, 1918.

Navy Dept., Bureau of Ordnance,
Washington, D. C.
Attention Commander Richmuth.

Re Contract 949 for 400 3" Anti-aircraft Gun Mounts, and Contract 1498 for 250 3" Anti-aircraft Gun Mounts.

Dear Sir:

We propose to make deliveries of gun mounts as follows:

1918	Shipped	1919	Shipped
June	5	January	75
July	20	February	75
August	40	March	75
September	50	April	75
October	60	May	40
November	60		
December	75		650

2. We would respectfully ask your permission to allow us to apply all shipments on mounts on the first contract until same is completed, and then follow with shipments on the second contract. This will greatly simplify the handling of all records and manufacturing of parts in the factory. You will note from deliveries given in the first paragraph that in the month of February the first fifteen months would complete contract 949 and the balance of 60 mounts to be delivered in February and the deliveries in the months of March, April, and May would complete the second contract #1498 of 250 mounts.

3. Extension of contract. We have been seriously delayed in supplying gun mounts in accordance with deliveries outlined in our contracts due to conditions beyond our control, and believe that in connection with contract #949 specifying 400 3" anti-aircraft gun mounts that we are entitled to an extension of 90 days.

In regard to our second contract #1498 for 250 3" anti-aircraft gun mounts, we believe we are entitled to some extension due to difficulties in securing material, but at this time are not prepared to give any idea as to the amount of extension that should be allowed.

We are in the meantime proceeding to do everything possible to hurry this work along, and at the proper time will be pleased to discuss with you the matter of extension.

Will you kindly let us have the desired information as soon as possible?

Yours very truly,
RUSSELL MOTOR CAR CO., INC.,
C. R. Burt, General Manager."

On October 11, 1918, the claimant wrote Admiral Ralph Earle, Chief of the Bureau of Ordnance of the Navy Department as follows:

"October 11, 1918.

Admiral Ralph Earle,
Navy Dept., Bureau of Ord.,
Washington, D. C.

Re Contr. 949-400 3" A. A. Mounts; Contr. 1498-250 A. A. Mounts.

Dear Sir:

Your letter of September 25th received and note that you grant our request relative to shipping all of the gun mounts and the 1st contract 949 until the order is completed and follow with shipments applying on the second contract.

We thank you for granting us this concession, which is entirely satisfactory.

Very truly yours,
RUSSELL MOTOR CAR CO., (INC.)
C. R. BURT,
Gen. Mgr."

On September 25, 1918, the Navy Department Bureau of Ordnance, by Admiral Ralph Earle, Chief of said Bureau of Ordnance, wrote the plaintiff as follows:

"Navy Department,
Bureau of Ordnance,
Washington, D. C., Sept. 25, 1918.

33901 373 (M2-5) O.
EA.

Subject: Contr. 949 for 400 3" A. A. Mounts and Contr. 1498 for 250 3" A. A. Mounts.

Reference: (a) Company's letter of Sept. 19, 1918.

Sirs:

Receipt is acknowledged of the company's letter of Sept. 19, containing in the first paragraph proposed schedule of deliveries of mounts on the above contracts.

The company's request for permission to

apply all shipments of mounts on the first contract, No. 949, until same is completed, is approved.

With reference to the company's remark concerning extension of time on contract No. 949: in order that proper consideration may be made to such claims at the expiration of the contract, it is suggested that your company forward the bureau promptly written notification of specific instances where delays beyond your control have occurred in accordance with the stipulation mentioned in the contract.

Very truly yours,

RALPH EARLE.

Russell Motor Car Co.
Via: Naval Inspec. of Ordnance, Homestead Steel Works,
Munhall, Pa."

(pp. 122, 123, 124.)

The plaintiff company manufactured and was able to deliver to the United States in the month of October, 1918, ten gun mounts under contract 1498 and manufactured and was able to deliver under said contract fifteen gun mounts in the month of November, 1918, and would have made such deliveries on said contract but for the consent of the United States to changed deliveries as set out in the above correspondence and to application of said ten and fifteen gun mounts on contract 949. Relying upon the consent of the United States to said amended schedule of deliveries said ten and fifteen gun mounts so manufactured in October and November, respectively, with all other mounts manufactured during those months, were delivered to the United States to apply on said contract 949. [p. 124].

As appears from the above correspondence (p. 124), the plaintiff claimed that it was entitled to an extension of time under these contracts due to conditions beyond its control; also that the change would be for the material benefit of both parties in their accounting under the two contracts. This was in part the asserting of a right, and when the United States consented to the amending of the schedule of deliveries, the terms of the contracts were naturally changed so far as the dates for deliveries and amounts thereof are concerned. It would seem immaterial as affecting any question of damages or a waiver of any right to damages on the part of the claimant as to which one of the parties wrote the first letter, or made the suggestion that the contracts be changed. We mention this as the Court of Claims seems to lay some emphasis upon this fact (p. 141). Until the amending of the deliveries under the contracts as above, they ran concurrently for the months of November, December, 1918, and January, 1919.

Contract 949 for the 400 mounts was fully performed by the claimant, the Government making payment in full and no deductions being made by reason of any delays (p. 124).

After contract 1498 (the one in suit) was made, the claimant secured additional premises, machinery, tools, ordered extra material and proceeded doing shop work, as well as making contracts for material with sub-contractors for castings, forg-

ings and steel parts to carry out the contract (p. 121).

A gun mount and sight is an intricate piece of ordnance weighing approximately six thousand pounds and requires the handling of large pieces of material, and at the same time involves the greatest precision, particularly in the elevation of the gun. The variation of a thousandth of an inch in the measured distance of the piece will throw out the result of the gun fire, owing to the length of travel of the projectile. Operators of great mechanical skill were required (p. 121).

The claimant after installing and equipping its plant between November of 1917, and March of 1918, started the actual work on the material for the gun mounts and sights under the first contract, the Navy maintaining inspectors in the plant and keeping in constant touch with the progress of the work and the quality and accuracy of the workmanship. (p. 121).

On November 23, 1918, the plaintiff was ready, able, and willing, and fully prepared to and could and would have completed and delivered the number of gun mounts and sights required of the kind and quality prescribed by contract 1498, if it had not been prevented from so doing by the United States and the Secretary of the Navy acting in its behalf. (p. 126).

At the time the said letter of November 23, 1918, was received, the plaintiff had completed all engineering, designing and drafting work, and it had on hand or in course of delivery, all materials necessary to perform the contract 1498 in its entirety and had all necessary tools, dies, jigs, fixtures, machinery, and an adequate and efficient organization of employees, competent for the complete performance of the contract, being fully ready, able, and willing to carry out the terms of said contract on its part to be performed. The engineering, designing, and drafting work above referred to was necessary as a preliminary to the performance of contract 949. (p. 126).

We take the liberty of quoting the following findings of the Court of Claims in full, for it is mainly upon the facts therein stated that the questions of law in this appeal arise:

"XIV.

Just compensation to the plaintiff company for the cancellation of said contract 1498 is $405,250.34, which amount includes determined allowance on account of raw materials purchased for the fulfillment of said contract with an added allowance for handling and other expenses in connection therewith, finished parts in their proportionate value to all the parts entering into a gun mount, cost of assembling not included, semi-finished parts on the same basis, percentage of completion considered, supplies, tools, jigs and fixtures, subcontractors' claims paid, office supplies, rentals, amortization of special machinery purchased for the performance of

this contract, installation of machinery, packing and shipping, miscellaneous expenses, and an additional allowance to cover possible contingencies not included in the itemization.

Plaintiff has received and is chargeable as against said amount the sum of $333,635.76."

"XV.

The actual cost to the contractor of producing and delivering 250 gun mounts and sights under contract 1498, including all labor, material, and overhead, and all expenses required to be borne by the contractor, including all contingent expenses which might reasonably have been incurred or which might reasonably arise out of its complete performance of contract 1498, was $978,875.00, or a total cost each per gun mount and sight of $3,915.50. Had the plaintiff been permitted to make and deliver the full quantity of gun mounts and sights called for by its contract 1498 at the contract price of $7,860.09 each it could and would have earned and received a profit of $966,416.32, or $3,841.66 on each mount and sight, assuming the performance of the contract under existing conditions without unforeseen contingencies or reductions by way of liquidated damages to delays.

If the plaintiff is entitled to recover an account of anticipated profits in addition to the amounts included in just compensation in Finding XIV the amount it is entitled to recover on that account is $726,120.15 reduced from the amount first stated above to that amount by reason of elements included in some of the items entering into just compensation as determined in Finding XIV."

"XVI.

"Just compensation as determined in Finding XIV does not include any allowance

because of the fact that after the cancellation of contract 1498 the plaintiff was still required to complete contract 949 and could not, while manufacturing the mounts and sights for the completion of the contract last named, sell or dispose of its buildings, plant, or machinery or disband its organization, nor does it include profit on 25 mounts delivered in October and November on contract 949, which, but for the change in the schedule of deliveries, might have been delivered on contract 1498, nor does it include any allowance for the cost of maintaining an office at Buffalo, N. Y., during 1920 and 1921 for the closing up of its affairs."

"CONCLUSION OF LAW.

"On the facts found the court concludes as matter of law that the plaintiff is entitled to recover one hundred sixty-one thousand six hundred fourteen dollars and fifty-eight cents ($161,614.58), as set out in Finding XIV, and that it is not entitled to recover as otherwise claimed, and judgment is directed for said sum of one hundred sixty-one thousand six hundred fourteen dollars and fifty-eight cents ($161,614.58) (pp. 129, 130, 131)."

From the above quoted Findings of Fact, and the Conclusion of Law based thereon, it is undisputable that if the plaintiff had been permitted to carry out contract 1498, that the difference between the contract price and the cost of its performance, making allowance for all contingent expenses which might reasonably have been incurred or which might reasonably arise out of the complete performance of the contract, was $[illegible] 41632. The Court of Claims found that some of

this sum was allowed by it and by the Government in finding "just compensation" to which plaintiff is entitled to be the sum of $495,250.34.

This Court should not receive the impression that although the Navy Department offered it an apparently large sum of money as alleged "just compensation" that it, in substance, represented anything else than its outlay and moneys which it had expended up to November 23, 1918, when the Secretary of the Navy directed claimant to cease work. The claimant had expended or incurred obligations to substantially that amount for raw material, manufacture of finished parts and semi-finished parts, supplies at cost, tools, jigs and fixtures, sub-contractors' claims, installing machinery, rentals, property, etc., providing a large and efficient organization with purchasing, executive, accounting and cost-keeping departments, made up of men who had been trained in the manufacture of munitions (pp. 121, 126, 127, 128, 129, 130). This figure of $495,250.34 made no allowance to claimant for any "just compensation" or damages that properly accrued to it by virtue of the circumstances after the date of the Navy's direction to claimant to cease work.

The Court, however, specifically finds, as quoted above, that if the claimant was entitled to recover profits in addition to the just compensation awarded the company in the sum of $495,250.34, it would be entitled to recover the sum of $726,

120.15. The larger sum of $960,416.32 is reduced by the sum of $234,296.16 on the ground that this amount is included in the sum of $495,250.34— the "just compensation" found by the court (pp. 129, 130), leaving the further amount due on this item of $726,120.15.

This last stated sum the Court of Claims held as matter of law was not due claimant. [pp. 130, 131].

In other words, it appears without dispute from the Findings of the Court of Claims, that if the plaintiff was entitled to have its damages figured in this case in accordance with the well recognized principles of this court, (supporting authorities cited *infra*), and based on the difference between the contract price and the cost of performance of the contract, then the decision of the Court of Claims should be reversed and it should be directed to increase the amount of judgment which is awarded to the claimant, by the additional sum of $726,120.15.

The Court of Claims and Government take the position that the Act of June 15, 1917, (discussed later), permits the cancellation of the contract and relieves the United States from all damages to claimant after such cancellation.

LAW.

POINT I.

The claimant is entitled to be awarded its full damages based upon the difference between the contract price and the cost of full performance to it, making due allowances for all contingent and other expenses that might reasonably arise out of such full performance.

The questions of law are clearly raised and properly before this court.

The Court of Claims erred in refusing to award damages and to fix the just compensation to which the claimant-appellant is entitled, in accordance with the well-settled principle that such damages should be measured by the difference between the contract price and the fair cost to the claimant-appellant of its performance of its obligations under the contract. (pp. 129, 130, Findings XIV, XV, XVI, Conclusion of Law, Opinion, pp. 142-3).

As appears from the Finding of Fact XV (p. 130) of the Court of Claims, the claimant would have earned and received a profit of $960,416.32, based upon the full performance of the contract. The claimant was "fully ready, able and willing to carry out the terms of said contract on its part to be performed" (p. 126). The Court of Claims

finds that some part of the $960,416.32 is included in its award of just compensation in the sum of $495,250.34, but specifically finds that $726,120.15 is not included in such sum, and to which said amount plaintiff would be entitled to recover in addition to the $161,614.58 allowed in its judgment. No allowance or damages are awarded claimant for profits it concededly would have made after the date the Navy Department directed the cessation of work under contract (pp. 130, 131, 142, 143).

These damages are neither speculative, indefinite or uncertain but have been clearly established and conclusively found as correct and actual by the findings of the Court of Claims. [p. 130].

If the claimant is entitled to recover any damages or profits after the date when the Navy Department refused to continue the contract, or to put it in other language, if the claimant is entitled to have its damages figured on the difference between the contract price and the cost of performing of the contract as of November 23, 1918, when the Navy Department directed the claimant to cease its work, then the judgment of the Court of Claims should be reversed, and it should be directed to increase the judgment heretofore rendered by it by the sum of $726,126.15.

There is no ambiguity regarding the written contract in this case. The contract and the specifications annexed thereto were prepared by the Government officials. It contained no clause permitting any cancellation thereof. Certainly neither of the parties were contemplating that the Act of June 15, 1917, had any relation thereto. The court will notice that paragraph "Fifteenth" of the contract provides that it is awarded "conformably to restrictive provisions in the Naval Appropriation Act of March 4, 1917, upon the express understanding that the party of the first part is not a party to any existing combination or conspiracy to monopolize any interstate or foreign commerce (pp. 19, 20)." This is the only statute that the parties can fairly be held to have had in contemplation as affecting the contract.

The contract is apparently and by its terms made in conformity with the Act of March 4, 1917, (40 Stat. 182), which Act is entitled, "An Act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes." Among its provisions are the following:

"BUREAU OF ORDNANCE.

"ORDNANCE AND ORDNANCE STORES: For procuring, producing, preserving, and handling ordnance material; for the armament of ships for fuel, material, and labor to be used in the general work of the Ordnance Department; for furniture at naval

magazines, torpedo stations, and proving grounds; for maintenance of the proving ground and power factory and for target practice; for the maintenance, repair, or operation of horse-drawn passenger-carrying vehicles, and one motor-propelled passenger-carrying vehicle, to be used only for official purposes at naval magazines, the naval proving ground, Indianhead, Maryland, and naval torpedo stations, and for pay of chemists, clerical, drafting, inspection, and messenger service in navy yards, naval stations, and naval magazines: Provided, That the sum to be paid out of this appropriation under the direction of the Secretary of the Navy for chemists, clerical, drafting, inspection, watchmen, and messenger service in navy yards, naval stations, and naval magazines for the fiscal year ending June thirtieth, nineteen hundred and eighteen, shall not exceed $750,000; in all, $8,488,333.00."

"INCREASE OF THE NAVY.

"INCREASE OF THE NAVY, ARMOR AND ARMAMENT: Toward the armor and armament for vessels heretofore authorized and the additional vessels herein appropriated for, to be available until expended, $44,180,000."

"NAVAL EMERGENCY FUND.

"To enable the President to secure the more economical and expeditious delivery of materials, equipment, and munitions and secure the more expeditious construction of ships authorized and for the purchase or construction of such additional torpedo boat destroyers, submarine chasers and such other naval small craft; including aircraft, guns and ammunition for all of said vessels and aircraft and for each and every purpose connected therewith, as the President may di-

rect, to be expended at the direction and in the discretion of the President, $115,000,000, or so much thereof as may be necessary, and to be immediately available."

The above act does not relate to the Shipping Board but is a grant of powers to the Navy Department, a fighting arm of our government, enabling it to secure, arm vessels and buy "war material."

The provisions of this Act of March 4, 1917, giving the President additional powers within the limits of the amounts appropriated therefor, [discussed more fully later] to place orders for ships or war material and making compliance therewith obligatory on the party to whom such order was given, and authorizing "within the limits of the amounts appropriated therefor to modify or cancel any existing contract for building production or purchase of ships or war material, etc.," are distinct from the provisions authorizing the Navy Department and the President to enter into a contract involving the consent of both parties, as is the case in regard to the contract upon which this action was based. Provisions giving the President mandatory powers in regard to the placing of orders, cancelling contracts and appropriation of factories, was the grant to him of powers of eminent domain. These powers specifically do not apply to the contract in this case because they were only applicable to "any existing contract," and the

contract in this action was not made until May 14, 1918.

The above provisions, eminent domain in character, were contained in paragraph (b) of the Act of March 4, 1917, under the title, "Naval Emergency Fund"; the last provision in said paragraph (b) providing: "That all authority granted to the President in this paragraph to be exercised in time of national emergency, shall cease on March 4, 1918." Indeed, paragraph "Fifteenth" of the contract, incorporating various of the provisions of this Act of April 4, 1917, indicates that it was the intent of the government officials that this contract was made by and governed by its terms.

As the act only gave the Government power to cancel or modify existing contracts (irrespective of the unsettled dispute of whether this power relates to Government as well as private contracts between third parties), claimant was fairly entitled to assume that as there were no provisions in the contract itself authorizing its cancellation, the contract was permanent in nature and the Government was obliged to take the materials called for therein, so long as the plaintiff was able, ready and willing to manufacture and deliver the same.

It is respectfully submitted that claimant's right to recover this additional sum of $726,120.15 is sustained in the following cases:

United States v. Purcell Envelope Company, 249 U. S. 313. The court in delivering its unanimous opinion, at page 320, stated:

> "The Court of Claims decided that the measure of damages was the difference between the cost to the envelope company of materials and the manufacture and delivery of the envelopes and wrappers in accordance with the terms of its contract, and what it would have made if it had been allowed to perform the contract. For this the court cited and relied upon *Rhoem v. Horst*, 178 U. S., 1. It is there decided that the positive refusal to perform a contract is a breach of it, though the time for performance has not arrived, and that the liability for the breach at once occurs. And it is further decided that the measure of damages is the difference between the contract price and the cost of performance. The case was replete in its review of prior cases. We may, however, refer to *United States v. Speed*, 8 Wall, 77, 85; *United States v. Behan*, 110 U. S., 338; *Hinckley v. Pittsburgh Steel Company*, 121 U. S. 264."

In *United States v. Behan*, 110 U. S., 338, a contract was made with the Engineer of the Army to make certain improvements in the harbor of New Orleans. The Court of Claims found that the plaintiff had made extensive preparation and a large initial expenditure for carrying on the work, and that he engaged actively in carrying on the contract and incurred large expenditure for labor and materials and had proceeded for some time in the undertaking when the work was stop-

ped, without fault on the part of Behan. The court said:

> "Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures. So far as appears, they were incurred and in the fair endeavor to perform the contract which he assumed. If they were foolishly or unreasonably incurred, the Government should have proven this fact. It will not be presumed. The court finds that his expenditures were reasonable. The claimant might also have recovered the profits of the contract if he had proven that any direct, as distinguished from speculative, profits would have been realized. But this he failed to do; and the court below very properly restricted its award of damages to his actual expenditures and losses.
>
> The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: First, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of *Masterson v. Mayor of Brooklyn*, 7 Hill 61

they are 'the direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.' Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense. This loss, however, he is clearly entitled to recover in all cases, unless the other party, who has voluntarily stopped the performance of the contract, can show the contrary.

"The rule as stated in Speed's case is only one aspect of the general rule. It is the rule as applicable to a particular case. As before stated, the primary measure of damages is the amount of the party's loss; and this loss, as we have seen, may consist of two heads or classes of damage—actual outlay and anticipated profits. But failure to prove profits will not prevent the party from recovering his losses for actual outlay and expenditure. If he goes also for profits, then the rule applies as laid down in Speed's case, and his *profits* will be measured by 'the difference between the cost of doing the work and what he was to receive for it,' etc. The claimant was not bound to go for profits, even though he counted for them in his petition. He might stop upon a showing of losses. The two heads of damage are distinct, though closely related. When profits are sought a recovery for outlay is included and something more. That something more is the profits. If the

> outlay equals or exceeds the amount to be received, of course there can be no profits."

To the same effect see *United States v. Spearin*, 248 U. S. 132.

In the case at bar claimant proved its non-speculative certain damages and the Court of Claims by its findings of fact established the claimant's right as a matter of law within the principles above enunciated to be awarded $726,120.15 in addition to the sum of $161,614.58 contained in the judgment herein appealed from.

The rule has been well recognized for many years.

> *Moore v. U. S.*, 1 C. C. 90.
> *Wilder v. U. S.*, 5 C. C. 468.
> *Floyd v. U. S.*, 2 C. C. 429.
> *Harvey v. U. S.*, 8 C. C. 501.
> *Cobb v. U. S.*, 7 C. C. 470.
> *Kellogg Bridge Co. v. U. S.*, 15 C. C. 206.
> *Cohen v. U. S.*, 15 C. C. 253.
> *Moore v. U. S.*, 17 C. C. 17.

In *Myerle v. United States*, 31 C. C. 105, the court said in its opinion:

> "The rule has not been uniform or very clearly settled as to the right of the party to claim a loss of profits as a part of the damages for breach of a special contract, but we think there is a distinction by which all gains of this sort can be easily decided. If the profits are such as would have accrued and

grown out of the contract itself, as the direct and immediate result of its fulfillment, then they would form a just and proper item of damage to be recovered against the delinquent party upon a breach of the agreement. These are part and parcel of the contract itself and must have been in the contemplation of the parties when the agreement was entered into, but if they are such as would have been realized by the party from other independent and collateral undertaking, although entered into in consequence and on faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damage occasioned by the breach of the contract in suit."

Houston Construction Company v. U. S., 38 C. C. 724.

Ellicott Machine Company v. United States, 43 C. C. 469.

Anderson v. United States, 51 C. C. 228.

Roehm v. Horst, 178 U. S. 1, p. 21.

Hickley v. Pittsburgh Steel Company, 121 U. S. 264, p. 276.

United States v. Behan, 110 U. S. 338.

Speed v. United States, 8 Wall. 77.

Guerini Stone Company v. Carlin, 240 U. S. 264.

Guerini Stone Company v. Carlin, 248 U. S. 334.

Claimants only seek in this action the damages which this court has held to be "part and parcel of the contract itself."

We do not understand that the Government contends that the claimant is not entitled to have its

damages and compensation based upon the rule set forth in the cases cited above, to wit, the difference between the contract price and the cost of full performance to the claimant, unless this court shall find that the Act of June 15, 1915, (40 Stat. 182) shall be construed as a part of claimant's contract and that its rights are regulated and measured thereby, in accordance with the interpretation given to that Act in the opinion of the Court of Claims.

In other words, judgment of the Court of Claims should be reversed unless this court adopts the defense of the government, which is based principally, if not solely, on its contention that the claimant should be deprived of its lawful, constitutional and common law damages, recognized and sustained by this court, because of the provisions of the act of June 15, 1917 (40 Stat. 182).

We submit, and shall discuss the proposition at length later, that neither this statute or any other, can legally deprive the claimant of its right to have its just compensation or damages, arising from the failure of the United States to carry out its contract, measured by the difference between the contract price and the cost of the full performance thereof.

POINT II.

The Act of Congress of June 15, 1917, (40 Stat. 182) does not apply to this case and should not be construed to regulate or affect claimant's rights or deprive it of its damages and profits due to the failure of the United States to carry out its contract.

We will first quote various of the provisions of this law. This act is entitled, "An act making appropriations to supply urgent deficiencies in appropriations for the military and naval establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes.

[This court will notice claimant's contract was not entered into prior to June 30th, 1917, nor could a contract not in existence have anything to do with an existing deficiency.]

> "The President is hereby authorized and empowered, within the limits of the amounts herein authorized—
>
> (a) To place an order with any person for such ships or material as the necessities of the government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.
>
> (b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production or purchase of ships or *material*.

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: PROVIDED, that all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct.

The word 'person' as used herein, shall include any individual, trustee, firm, association, company, corporation or contractor.

The word 'ship' shall include any boat, vessel, or submarine and the parts thereof.

The word 'material' shall *include stores, supplies and equipment* for ships and every-

thing required for or in connection with the production thereof.

The word 'plant' shall include any factory, workshop, warehouse, engine works buildings used for manufacture, assembling, construction, or any process; any shipyard or dockyard and discharging terminal or other facilities connected therewith.

The words 'United States' shall include all lands and waters subject to the jurisdiction of the United States of America.

All authority granted to the President herein, or by him delegated, shall cease six months after a final treaty of peace is proclaimed between this Government and the German Empire.

The cost of purchasing, requisitioning, or otherwise acquiring plants, material, charters, or ships now constructed or in the course of construction and the expediting of construction of ships thus under construction shall not exceed the sum of $250,000,000, exclusive of the cost of ships turned over to the army and navy, the expenditure of which is hereby authorized, and in executing the authority granted by this act for such purpose the President shall not expend or obligate the United States to expend more than the said sum; and there is hereby appropriated for said purpose, $150,000,000; Provided, that this appropriation shall be reimbursed from available funds under the War and Navy Departments for vessels turned over for the exclusive use of those departments or either of them.

The cost of construction of ships authorized herein shall not exceed the sum of $500,000,000, the expenditure of which is hereby authorized, and in executing the authority granted herein for such purpose the President shall not expend or obligate the United

States to expend more than said sum; and there is hereby appropriated for said purpose, $250,000,000.

For the operation of the ships herein authorized or in any way acquired by the United States, except those acquired for the army or navy, and for every expenditure incident thereto, $5,000,000."

Claimant's contract was the result of mutual agreement with the Secretary of the Navy and had no birth in or relation to the mandatory powers given the President and quoted above. The part of the Act of June 15, 1917, relating to the "Emergency Shipping Fund" is but a small part of the whole appropriation bill, containing, in pamphlet form, some 41 pages. The Act deals with the Council of National Defense, The Emergency Shipping Fund, Bureau of Efficiency, Civil Service Commission, Treasury Department, War Department, State War and Navy Department Buildings, and also contains separate provisions granting specific powers and appropriations to the Navy Department distinctly collected in a part of the Act much later than those relating to the Emergency Shipping Fund quoted above. In these provisions the Navy Department and the Secretary of the Navy were authorized to do many things in the various departments. The following provision, now quoted, is entirely adequate to cover the contract for the gun mounts and sights with the claimant as being "armament of ships;"

"BUREAU OF ORDNANCE.

ORDNANCE AND ORDNANCE STORES: For procuring, producing, preserving, and handling ordnance material; for the armament of ships; for fuel, material, and labor to be used in the general work of the Ordnance Department; for necessary improvements at the naval proving ground naval torpedo stations, naval gun factory, and naval ammunition depots; and for pay of chemists, clerical, drafting, inspection, watchmen, and messenger service in navy yards, naval stations, and naval ammunition depots: Provided, That the sum to be paid out of this appropriation under the direction of the Secretary of the Navy for Chemists, clerical, drafting, inspection, watchmen, and messenger service in navy yards, naval stations, and naval ammunition depots, shall not exceed $725,000; Provided further, That not exceeding $81,500 of this amount may be expended for the services of clerks, draftsmen, and such other technical assistants as the Secretary of the Navy may deem necessary in the Bureau of Ordnance; in all, $16,905,366.

"For procuring, producing, preserving, and handling ammunition for vessels, $68,664,858; Provided, That no part of any money appropriated by this Act shall be expended for the purchase of powder other than small-arms powder at a price in excess of 53 cents a pound: Provided further, That in expenditures of this appropriation, or any part thereof, for powder, no powder shall at any time be purchased unless the powder factory at Indianhead, Maryland, shall be operated on a basis of not less than its full maximum capacity.

"For new batteries for ships of the Navy, $22,333,000.

"For batteries for auxiliaries and merchantmen, $29,672,000.

"For ammunition for auxiliaries and merchantmen $19,988,800.

"For purchase and manufacture of torpedoes and appliances, $11,242,000."

We submit that the provisions of the above quoted act have no application to this case, and did not authorize the cancellation of the contract under the circumstances involved, for the following reasons:

A. The act related to the work of the Shipping Board and there has never been any delegation by the President to the Navy Department carrying authority to cancel claimant's contract.

Among the latter provisions of the act quoted above, will be observed that, the cost of "purchasing, requisitioning or otherwise acquiring * * * material, charters or ships * * * shall not exceed the sum of $250,000,000 EXCLUSIVE OF THE COST OF SHIPS TURNED OVER TO THE ARMY AND NAVY, THE EXPENDITURE OF WHICH IS HEREBY AUTHORIZED * * *."

In the case at bar claimant had no dealings whatsoever with the Shipping Board, and so, clearly, these provisions are inapplicable. To be applicable the phrase above quoted should have read, "acquisition by" if the act contemplated action by the Secretary of War or Navy. Apparently this was the view taken by the President. Claimant's contract was with Navy Department.

The cancellation was by Navy Department. The Shipping Board was not acting in any way.

Claimant's contract clearly is not made under this act. It is unjust and unfair to now seek to deprive it by virtue of this uncontemplated unrelated act of its lawful damages, "part and parcel of the contract itself."

As noted in the act, the powers conferred therein were to be exercised by the President acting "through such agency or agencies as he shall determine from time to time." On July 11, 1917, the President issued the following executive order:

> "By virtue of authority vested in me in the section entitled, 'Emergency Shipping Fund' of an act of Congress entitled 'An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, insofar as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.
>
> And I do further direct that the United

States Shipping Board shall have and exercise all power and authority vested in me in said section of said act, insofar as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels, or parts thereof, or charters therein; and the operation management, and disposition of such vessels, and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said board, be exercised directly by the said board or by it through the United States Shipping Board Emergency Fleet Corporation or through any other corporation organized by it for such purpose."

This order will be found in Part 5, p. 4976, of the hearings before the Select Committee on United States Shipping Board Operations, 66th Cong., 2d Sess.; in H. R. Rep. 1339, 66th Cong., 3d Sess., p. 27; Official Bulletin, July 13, 1917; and elsewhere.

The cancellation of the contract in this case was not under the above authority.

By executive order dated August 21, 1917, the President delegated his powers under the above quoted Act of June 15, 1917, and also the Act of March 4, 1917, to the Secretary of the Navy, as follows:

"EXERCISE OF AUTHORITY UNDER THE 'NAVAL EMERGENCY FUND ACT' AND OTHERS.

"By virtue of authority vested in me in the section entitled 'Naval Emergency Fund' of

an act of Congress entitled 'An Act Making appropriations for the Naval Service for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes,' approved March 4, 1917, and in the section entitled 'Emergency Shipping Fund' of an act of Congress entitled 'An Act Making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved June 15, 1917, I hereby direct that the Secretary of the Navy shall have and exercise all power and authority vested in me in said sections of said acts, inso far as applicable to and in furtherance of the construction of vessels for the use of the Navy and of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for construction of vessels for the Navy and of war materials, equipment, and munitions required for the use of the Navy, and the more economical and expeditious delivery thereof.

The powers herein delegated to the Secretary of the Navy may, in his discretion, be exercised directly by him, or through any other officer or officers who, acting under his direction, have authority to make contracts on behalf of the Government.

WOODROW WILSON."

(The above order will be found at page 176 in book entitled "Emergency Legislation to December, 1917, with analogous Legislation," and is also referred to in the opinion of Court of Claims in this case, p. 134.)

A careful examination of the above orders will disclose that the one of June 11, 1917, was a delegation of the power of any rights of the President under the Act of June 15, 1917, to the United States Shipping Board, there being no delegation by the President of any of his powers to the Navy Department.

There was no statement or reference in the letter of the Navy Department of Nov. 23, 1918, whereby claimant was directed to cease work, that the Secretary of the Navy was acting under or pursuant to authority delegated to him by the President by the above order. This idea originated when the Department of Justice took up the defense to claimant's demands for its lawful damages.

Annexed hereto and marked "Exhibit A" are extracts from the Congressional Record of the 56th Congress, 1st Session, Vol. 55, p. 3, indicating that there was no thought in the mind of any of the Legislators but that the Act of June 15, 1917, related solely to the Shipping Board.

Although some confusion may exist in the authorities, we submit that the debates of Congress and the statements of the chairman in charge of the bill are properly for the consideration of this court in view of the ambiguities in the act under consideration.

Binns v. U. S., 194 U. S., 486, p. 495.
U. S. v. St. Paul, etc., R. R. Co., 247 U. S. 310, at p. 318.
Duplex Co. v. Deering, 254 U. S. 443, at pp. 474-5.
U. S. v. Pfitsch, 256 U. S. 547, at p. 551.
Railroad Commission of Wisconsin v. C. B. & Q. R. R. Co.
Advance Opinions United States Supreme Court, dated February 27, 1922, p. 236, at p. 243.

Under the order of August 21, 1917, the President delegated and authorized the Secretary of the Navy to exercise any of his powers under either of the Acts of March 4, 1917, or June 15, 1917, insofar as applicable *to the furtherance of* the construction of vessels for the use of the Navy and the completion thereof and for the requisitioning of materials for the construction of vessels for the Navy and war materials, equipment, ammunitions required for the use of the Navy and the more economical and expeditious delivery thereof. We submit that it is perfectly clear that there was no delegation of any of the powers of the President by virtue of this order to the Secretary of the Navy to cancel existing contracts in order to stop the further construction of vessels. It is perfectly well known that in August, 1917, the United States was taking every step necessary to buy ships, armament and ammunitions to carry on war. It was not a time when the President, the

Navy Department or any other department was considering or thinking of the cancelling of existing contracts in order to cut down expenses after the war was over, or after an armistice had been declared. The cancellation of the contract was not in the furtherance of, but was in derogation of the "production, purchase, or requisitioning of materials." We submit that it is clear that the power delegated by the President to the Secretary of the Navy, under the Act of June 15, 1917, to requisition plants or their output, and to commandeer any ships irrespective of whether the party being dealt with consented or not, are only grants of powers to the Secretary of the Navy looking towards the carrying on of the war and in no way related to the cancellation of contracts when war activities ceased.

The Lake Monroe, 250 U. S. 246, at pp. 251, 252-253-254-255.

B. The Act of June 15, 1917, relates only to private contracts and not to contracts to which the United States is a party.

We submit the reading of the above act in its entirety, sustains the fair inference that the intention of Congress was not to give the President the power to "modify, suspend, cancel or requisition any existing or future contract" to which the United States was a party. The use of the word "requisition" clearly indicates that the act was only intended to apply to private contracts or contracts between third parties and not contracts to which the United States is a party. The de-

bates and reports of Congress, (annexed hereto and marked "Exhibit A"), show that its purpose in enacting this commandeering regulation was in order to enable the country to work its ship yards to capacity on private contracts to face the menace of German submarines which were destroying ships of commerce on the sea and made vital and necessary the manufacture of ocean-going freighters to carry our supplies and men abroad. In regard to its own contracts the Navy Department and the United States were at liberty to incorporate therein any provisions that were desired in reference to giving the Navy Department the right to cancel or modify or suspend the contracts, or to provide for compensation or the damages to be paid in the event of the Government cancelling the same. We submit that Congress never intended that act of June 15, 1917, would be invoked to justify a cancellation by the United States of its own contract, otherwise than in accordance with the provisions contained in the contract or except with the customary liability attaching to such cancellation. There was no intent on the part of Congress to deprive a person or corporation who had voluntarily contracted with the Government, of his right to have his damages determined in accordance with well settled rules when he was ready, able and willing to carry out his contract, and through no fault of his own the United States directed him to cease further work and cancelled the contract so far as it is concerned.

The following language is quoted from in the opinion of the Court of Claims in this case:

> "It was contended in the former case and may be again argued that the use of the word "requisition" is decisive of the meaning of the provision since this word could only apply to private contracts and not to contracts with the United States, but we may not properly resort to one word as determinative of the question when four are for consideration. No doubt 'requisition' must find its application only to private contracts, since a conception of the Government attempting to requisition its own contract must be founded upon absurdity." (p. 135).

We do not understand that the Government contends or ever contended that the word "requisition," which is the last of the four words used, was ever intended by Congress to apply to or could ever be fairly construed to apply to ~~private~~ its own contracts.

We submit that the first three words, "modify, suspend and cancel," should not be interpreted as applying to a different kind, character or class of contracts than the word "requisition."

All four words under any proper rule of construction must relate to, operate upon and regulate the same class of contracts.

Under the well settled rule of "*ejusdem generis*," a general clause or designation in an act

following the enumeration of certain specific objects covered by the act is limited to those particular objects, and the act will not be given a construction to make it applicable to objects that might fall within a broader classification. By virtue of this recognized rule of construction, the act will be limited to the "class" designated and interpreted by and falling within the scope of the specific objects enumerated.

We will cite a few of the many cases sustaining this recognized rule of construction.

In *United States v. Salen*, 235 U. S. 237, Mr. Justice Lamar, in delivering the unanimous opinion of the Court said, at p. 247, in laying down rules which should be adopted in the construction of a statute:

> "It would ignore the fact that the meaning of words is affected by their context and violate the settled rule that words which standing alone might have a wide and comprehensive import, will when joined with those defining specific acts, be interpreted in their narrower sense and understood to refer to things of the same nature as those described in the associated list, enumeration or class. Cf. Virginia v. Tennessee, 148 U. S. 503, 519; United States v. Chase, 135 U. S. 255, 258; Neal v. Clark, 95 U. S. 704, 708."

Among other cases adopting the same rules are United States v. Nichols, 186 U. S. 298, p. 300.

United States v. Bevans, 3 Wheaton, 336; opinion by Marshal, C. J., p. 236.

The opinion of the Court of Claims in discussing this provision, makes the statement,—

> "* * * but with equal assurance may it not be said that Congress never intended to do such an uncalled for and wholly unjustified thing as to authorize the 'modification' of private contracts. The power and the purpose are equally beyond conception. Contracts must possess certain elements to give them life, and arbitrary modification without consent of parties would be impairment to the extent of destruction."

The Court apparently overlooks the fact that the President was being given powers of eminent domain, which, in fact, did authorize him to modify and cancel private contracts.

It would certainly be as unjustified and wholly beyond conception to cancel as to modify a private contract unless compensation was provided for in the act.

Such an act would have been clearly unconstitutional unless it carried with it provisions for "just compensation" to the parties whose contracts were thus modified or cancelled. The Act of June 15, 1917, carried such provisions. For example, supposing there was an existing private contract under which a corporation was building a

hundred ships for another contracting party or another company was manufacturing a thousand units of any kind that entered into the building of ships, the President clearly under the provisions of this contract could have modified the same by order, so that the contracting party would have been permitted to finish the manufacture and delivery of 50 ships or 500 of the articles covered by the contract and still required such party to deliver the other 50 ships or 500 units to the Government. Under these circumstances, we submit that the only rule which the courts would recognize as determining the just compensation to which the injured party was entitled under the circumstances would be the profit that he would have lost by reason of such modification of his contract by the President's order, and this would necessarily have been determined by ascertaining the difference between the contract price and the cost of performance of that part of the contract which the party was prevented from performing by reason of the modification of his contract by the President's order. If it is an uncalled for and wholly unjustified thing to modify or cancel a private contract without just compensation, is it not even more uncalled for, or more unjustified for the Government to modify or cancel its own contract without just compensation?

The reasoning in the opinion of the Court of Claims evidently proceeds upon the proposition

that a contract is not subject to eminent domain, and for that reason the whole argument falls. If the sovereign in any case may appropriate a contract to its own use then necessarily it may appropriate something less than the contract. Coupling that clause of the statute with the other powers conferred upon the President, we find that if manufacturer has contracts with private parties for materials which the President deems necessary for the prosecution of the war, the Government, may requisition the output and place itself in the position of the vendee. It may cancel the contract and require the owner of the factory to fulfill an executive order. It may suspend the execution of a private contract in order that an executive order may be filled, or it may modify a private contract in a case where the Government does not require all of the output, either by postponing performance with the vendee or by compelling him to take partial performance and share the balance with the Government. If the Government had the power to cancel such a private contract entirely, it surely could do something less than that, and that was what the statute intended to permit. The mistake which we submit occurs in the Court's opinion, however, is the surprised way in which it says that Congress never intended to do such an uncalled for and wholly unjustified thing and that the power and purpose are beyond conception. The very heart of the act is the creating arbitrary powers and providing for "just com-

pensation." Furthermore, the Court states that contracts must present elements to give them life, and modification without the consent of parties would be impairment to the extent of destruction.

Certainly the Court of Claims in its judgment took the life out of the rule of damages to which claimant was entitled by the decisions of this court. It applies an unrelated uncontemplated statute to deprive it of its contractual rights.

Private contracts are capable of being condemned under power of eminent domain.

Long Island Water Supply Co. v. Brooklyn, 166 U. S., 685,

Cincinnati v. L. & N. R. R. Co., 223 U. S., 390.

In the Long Island case *(supra)* the Court says:

> "'No State, it is declared, shall pass a law impairing the obligation of contracts; yet with this concession constantly yielded, it cannot be justly disputed, that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the eminent domain

of the State, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise * * * Now it is undeniable, that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the State, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfil it. But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are super-induced by the pre-existing and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in sub-ordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract affected by it, but recognizes its obligation in the fullest extent, claiming only the fulfillment of an essential and inseparable condition. * * * A distinction has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government

to resume or extinguish a franchise. The distinction, thus attempted, we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes; namely, that of the right in private persons, in the use or enjoyment of their private property, to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property and nothing more; it is incorporeal property, and is so defined by Justice Blackstone, when treating, in his second volume c. 3, p. 20, of the Rights of Things.' See also The Richmond, etc. Railroad Company v. The Louisa Railroad Company, 13 How., 71, 83; Boston & Lowell Railroad v. Salem & Lowell Railroad, 2 Gray, 1, 35, 36."

In Cincinnati vs. L. & N. R. R. Co., *supra*, the Court says:

"Constitutional inhibition upon any state law impairing the obligation of contracts is not a limitation upon the power of eminent domain. *The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefore.* Such an exercise of power neither challenges its validity nor impairs its obligation. Both are recognized for it is appropriated to an existing enforceable contract. It is a taking and not an impairment of its obligation. If compensation be made no constitutional right is violated."

C. The language of the Act of June 15, 1917, shows that the power of the Government to cancel contracts

was limited to contracts between third parties in which the consequent liability of the Government will be kept "within the limits of the amount herein authorized."

The cancellation of a government contract could not possibly increase the liability of the Government beyond the $250,000,000 appropriated by the act. If the contract was made under some prior appropriation act, the damages consequent upon the cancellation could not exceed the appropriation, because the contract price would be limited by the appropriation. If made under the act itself, the amount payable thereunder, whether as damages or as contract price, could not carry the total liabilities under the act beyond the $250,000,000, because the damages would be limited by the contract price, and that price must have been kept within the amount of the appropriation. On the other hand, the cancellation or commandeering of private contracts might carry the liabilities of the Government far beyond the $250,000,000 limit. The language of the act in this respect, therefore, tends to show that Congress intended only to provide for the cancellation of private contracts.

The language of the act shows also that the power of the President to cancel or modify contracts is limited to those cases in which such cancellation or modification is necessary to enable him to purchase, or requisition or otherwise acquire, ships, material, etc. This appears from the

following re-arrangement of the apposite provisions of the act:

> "Within the amount herein authorized '$250,000,000' for 'the cost of purchasing, requisition, or otherwise acquiring plants, material, charters, or ships now constructed or in the course of construction' the President is hereby authorized and empowered 'to modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.'"

The act nowhere shows an intention to empower the President to cancel or modify a contract for the purpose of relieving the Government from its liabilities thereunder. The object of the act was to enable the President to incur new liabilities in a manner not elsewhere provided for by law, and this could only be, so far as the modification or cancellation of contracts is concerned, by the modification or cancellation of private contracts.

D. A gun mount and sight is "ARMAMENT" and falls within the definition "War Material" as defined in the Acts of March 4, 1917, and July 1, 1918, and does not fall within the definition "Material" as provided in the Act of June 15, 1917, and, therefore, said act does not and should not be given any application to this contract.

The Act of June 15, 1917, does not include within its terms contracts for "war material," to wit, "arms, armament or ammunition," nor authorize the President to cancel contracts for "arms, armament or ammunition."

In the Act of March 4, 1917, we find the following definition:

> "The words 'war material' shall include arms, armament, ammunition, stores, supplies and equipment for ships and airplanes and everything required for or in connection with the production thereof."

In the Act of June 15, 1917, we find the following definition:

> "The word 'material' shall include stores, supplies, and equipment for ships and everything required for or in connection with the production thereof."

In Soule's Dictionary of English Synonyms we find the following definitions:

> "A. Armament—
>
> (2) Guns, cannon, arms, munitions of war.
>
> "B. Equipment — Accoutrement, furniture, apparatus, rigging, gear, outfit."

The above definition supports the interpretation that Congress did not intend "armament" which would include "gun mounts and sights" to be included within the word "material" as defined in the Act of June 15, 1917, but on the other hand intended it to fall within the provision "war material" of the Act of March 4, 1917, which Act, as this court will remember, was referred to and incorporated in the fifteenth paragraph of claimant's contract.

In view of the definition in the earlier act (March 4, 1917) it is clear that if the latter act

E. A reading and construing together of the provisions of the three acts [March 4, 1917, June 15, 1917, July 1, 1918] that might be applicable to war contracts for armament including that of the claimant, will sustain the interpretation of the said Act of June 15, 1917, that the provisions authorizing the President to cancel contracts has no application to such contracts made by the United States. Such construction should be given to the Act.

1. *The power to cancel contracts in these acts is merely incidental and supplemental to the general powers authorizing the President to appropriate factories and their output from third parties on paying just compensation.*

The general scheme of the three particular acts in question is the same. The acts generally were part of the uniform annual appropriation bills. To each of them, however, was added an article giving to the President the right to exercise mandatory powers in the nature of eminent domain, and providing for the payment of just compensation to those injured by their enforcement.

Mounting costs and inflated values at that time were known. If the Navy Department should have been required to compete in the open market with others it would have been forced into unconscionable contracts. It undoubtedly would have been met with demands for very high prices based upon claims that plants were operating to capacity for others. With that situation in mind, Con-

ADDENDA TO BE INSERTED IN BRIEF OF CLAIMANT, RUSSELL MOTOR CAR CO. VS. U. S. (CASE NO. 485), AND READ AS FOLLOWING PAGE 61 THEREIN.

The Navy Department reports show and the Court of Claims finds that a gun mount is "armament" in finding that it is "ordnance" and therefore it cannot be part of the equipment of a vessel of the navy.

Paragraph fifteen of the claimant's contract required it to furnish an affidavit to the Secretary of the Navy that "it was not a party to any existing combination or conspiracy to monopolize * * * trade in structural steel, ship plates, armor, armament, or machinery" (p. 20). The claimant furnished such an affidavit (p. 2). Clearly, the United States in the very contract under consideration determined as a fact that a gun mount was "armament."

This construction and determination was corroborated and confirmed in a formal and comprehensive report made by Ralph Earle, Chief of the Bureau of Ordnance, Navy Department, to the Secretary of the Navy in report entitled "Navy Ordnance Activities, World War, 1917-1918," and formally published by the Navy Department in 1920.

Chapter 4 of the report is entitled "Guns, Mounts, and Small Arms." In the first two paragraphs of this chapter, page 55, we find the following statement:

> "As has been explained in previous chapters, the principal part played by the United States Navy in the war was its share in the defeat of the submarine. The first measures for the accomplishment of this purpose were, of course, defensive ones, arming of merchant vessels, and instituting the convoy system."
> * * *

> "As has been previously explained under 'Arming Vessels,' the bureau's share in this diminution of submarine losses *was the provision of armament and ammunition* for naval vessels, large and small, and for merchantmen. In this chapter will be given in some detail the activities of the bureau in procuring the guns, gun mounts, and small arms for these vessels." (Italics above and later herein ours.)

Later in this same chapter, at page 62, under sub-title "Gun Mount Contracts," is the following statement:

"The bureau was assisted in its efforts to supply gun mounts by such firms as * * * [specifying 8 companies] the Russell Motor Car Co. of Buffalo, New York. These well-known and substantial companies in each case brought to bear on the problem of gun-mount production a trained and efficient engineering staff, the members of which threw themselves into the work in a manner worthy of the case they were serving." A photograph of the Russell Motor Car Company's assembly floor for three-inch anti-aircraft mounts and of such a gun and mount will be found on pages 66-1 and 66-2 of this report.

The report in particular from pages 38 to 62 makes it clear that not only were guns and gun mounts not "material" or "equipment for ships" as defined in the Act of June 15, 1917, but in fact were within the definition "war material" of the Act of March 4, 1917, and the term "armament" as therein contained. As is well known, Germany claimed it was illegal and in violation of international law to arm merchant ships and it was not until the Government of the United States authorized such arming in March, 1917, that it was done.

As stated in the above-referred-to report on page 40:

> "March 12, 1917, will always be remembered as the date on which the navy decided to *arm* offensively against the submarine all merchant vessels whose voyage carried them into the danger zone."

And again on page 41:

> "The first *armed* merchantman to sail for the danger zone was the *Manchuria,* sailing from New York on the morning of March 16, 1917."

And again on page 45:

> "This demand for guns grew more and more urgent during the first six months of 1918, as new ships were being *completed* by every shipbuilding company in the United States," etc.

Note the word "completed." The ships as ships were "completed" prior to being armed. Guns and mounts were not part of the ship.

The Court of Claims finds, as a fact, "the gun mount and sight is an intricate piece of ordnance" (Finding VII, p. 121). As shown above ordnance clearly includes "armament" within which are "gun mounts."

The words "equipment of vessels of the navy" have an equally definite and well understood meaning, and do not include "armament," "ordnance," or "gun mounts."

One of the leading, if not the leading authority on such matters is *Mahan's "Naval Administration and Warfare."* In discussing what falls within the terminology of the equipment of a naval vessel he points out the distinction above made and on page 60, of this work, appears the following:

> "Ordnance is a word which speaks for itself * * *."
>
> "Equipment is a term of less precise significance because of more varied and minute details. It corresponds to furnishing a building as a place to live and work in. For instance, there is embraced under this comprehensive idea the extensive and intricate electric system of lighting and motors with

the needed dynamos. Hence, also much that appertains to the movable house which a ship is, for example, anchors, charts, compasses, with navigation books," etc.

If further confirmation of this point is necessary reference is made to the report of the Secretary of the Navy for the year ending 1919, where, on pages 559-562, inclusive, is covered enumerations of articles of equipment of vessels of the navy. And again, in the report of the Secretary of the Navy for the year 1920, pages 650 and 651.

Reports of the Navy Department show that "equipment of vessels of the navy" do not include "armament," but merely the character of equipment included within the definition given by Admiral Mahan, such as boats, furniture, chests, stores, tools, materials such as iron, lumber, and nails, paints, etc.

So clearly is this division marked that articles of equipment for vessels of the navy are handled by an entirely separate bureau from the Bureau of Ordnance, which has full control of all matters relating to ordnance, arms, and armaments, including gun mounts.

Every reference deals with the problem of guns and gun mounts as "arms and armament" added by the navy as such to vessels already built and complete and definitely sets at rest any contention that they are "material" or "equipment of vessels." On this point the authority of the navy officials must surely be accepted as authoritative and final.

In the light of the foregoing the finding of the Court of Claims that a "gun mount" is "a part of the equipment of vessels" cannot legally be sustained, since under the undisputed facts these "gun mounts" were as a matter of law "arms" and "armament" as defined in the Act of March 4, 1917, and July 1, 1918.

This contention, if sustained, would definitely remove this contract from the subject-matter covered by the Act of

June 15, 1917, and would obviate the necessity on the part of this court of passing upon the applicability or construction of this act in its broader application as elsewhere discussed herein.*

*There can be no question but that claimant's gun mounts are "war material" and "armament," as defined in the Act of July 1, 1918. If the following provisions in said act, to wit: "Within the limit of the amounts appropriated therefor to modify or cancel any existing contract for the building, production, or purchase of ships or war material * * * that whenever the United States shall cancel or modify any contract * * * it shall make just compensation," applies to the contracts of the United States, as well as to private contracts, the claimant would unquestionably be entitled to its profits and compensation in the amount as elsewhere stated in this brief.*

This is so because this Act of July 1, 1918, was not in existence when claimant's contract was made on May 14, 1918, and could not, therefore, have been in the contemplation of the parties, or deemed by law as a part of such contract when made.

The Navy Department in 1919, after it had purported to cancel claimant's contract and when it was supposedly adjusting the just compensation to which claimant was entitled, specifically took the position that in adjusting these "armament" contracts, it was acting under the authority of the Act of July 1, 1918. In the Navy Department report

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*Through inadvertence appellant's counsel for Anderson Manufacturing Company, case No. 740, submitted with this case for determination by this court, made an erroneous statement on page 28 of brief in stating that "the instant case differs materially from the Russell case, No. 485, and Freygang *v.* United States, No. 480, in connection with which it is submitted to this court. In neither of these cases is any question made that the subject-matter of the contract was not within the terms of the Act of June 15, 1917." This statement is untrue so far as the Russell Motor Car Co. is concerned, as the argument above set forth must clearly indicate.

entitled "Annual Report of the Chief of the Bureau of Ordnance to the Secretary of the Navy for the Fiscal Year 1919" printed at the Government Printing Office and dated August 28, 1919, we find the following statement on the top of page 8, discussing the adjustment of war contracts, "the adjustment of contracts is being performed under authority of Naval Appropriation Act (H. R., 10854, Public No. 182, Sixty-fifth Congress), approved July 1, 1918." Further supporting this contention, this report refers to claimant's contract involved in this case, making this statement on page 13:

> "Settlement has been negotiated in all cases except those of * * * and one contract with the Russell Motor Car Co."

gress gave to the President a power which would make offers from the Navy effective, and that power was required to be expressly conferred by statute.

> "The power of eminent domain which resides in the state as an attribute of sovereignty is nevertheless dormant until called into exercise by an act of legislation. Until the statute authorizes an exercise of the power, it is latent and potential merely and not active or efficient, and the State can neither exercise the prerogative nor can it delegate its exercise except through the medium of legislation. Therefore, it is that whenever an attempt is made either by the officers of the state or by a corporation organized for a public purpose to take property under the power of eminent domain, the officers or body claiming the right must be able to point to a statute conferring it. In the absence of statutory authority private property cannot be invaded by this power, however strong may be the reasons for appropriation."
>
> In Matter of Poughkeepsie Bridge Co., 108 N. Y. 483.
>
> Lewis Eminent Domain, 3d Edition, Section 367 and cases cited, including Federal cases.

In the three acts under discussion (March 4, 1917; June 15, 1917; July 1, 1918) no right to modify or cancel contracts is reserved in the various Departments. Such rights are contained only in those articles which confer powers upon the President. By a careful examination of all the acts will be found that within the limits of

the amounts appropriated, the President is empowered,

(1) to place an order for ships or war material as the necessities of the Government to be determined by the President, may require and which are of the nature, kind and quantity usually produced or capable of being produced by such person, and compliance with the orders so stated to be obligatory;

(2) to modify or cancel any existing contract for the building, production or purchase of ships for war material in acts March 4, 1917, July 1, 1918 [to cancel future contracts for "material" act June 15, 1917] and if the contractor refused, the President was authorized to take immediate possession of any factory or any part thereof;

(3) to require the owner or occupier of any factory in which ships were built or produced, to place at the disposal of the United States the whole or any part of the output of the factory and to deliver such output or parts in such quantities and at such times as may be specified and at such reasonable price as shall be determined by the President; and

(4) to requisition and take over any factory or any part thereof.

It will be seen that the power of the President and the performance of his orders lacked the first essentials of a contract, to wit, free and open bargaining. The powers conferred upon the President were provisional remedies to aid the various government contracts. Under the above powers he was not authorized to contract. He was not authorized to cause an order to be entered and executed unless the person to whom it was given had a plant capable of producing the material supplied. In order that an evasion of such an order could not be made, three other powers were conferred,

(a) He could appropriate the output of any factory; or

(b) He could appropriate the factory; or

(c) He could cancel or modify contracts which the owner of the factory had with others.

The scheme of the statute seems obvious.

It will be noted that each succeeding appropriation bill for the Navy increased the amounts. The Navy was perfectly competent to make its own contracts.

It was not necessary to inject the President into the situation as a purchasing agent for Government Departments. Such a situation was never intended or contemplated. The power to make such purchases already existed in the Navy.

In *United States v. Corliss Steam Engine Co.*, 91 U. S. 321,

we find the following language in the unanimous opinion of the court, delivered by Mr. Justice Field:

> "The duty of the Secretary of the Navy, by the Act of April 30, 1798, creating the Navy Department, extends, under the orders of the President, to 'the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the naval establishment of the United States.' 1 Stat. 553. The power of the President in such cases is, of course, limited by the legislation of Congress. That legislation existing, the discharge of the duty devolving upon the secretary necessarily requires him to enter into numerous contracts for the public service; and the power to suspend work contracted for, whether in the construction, armament, or equipment of vessels of war, when from any cause the public interest requires such suspension, must necessarily rest with him. As, in making the original contracts, he must agree upon the compensation to be made for their entire performance, it would seem, that, when those contracts are suspended by him, he must be equally authorized to agree upon the compensation for their partial performance. Contracts for the armament and equipment

> of vessels of war may, and generally do, require numerous modifications in the progress of the work, where that work requires years for its completion. With the improvements constantly made in ship-building and steam-machinery and in arms, some parts originally contracted for may have to be abandoned, and other parts substituted; and it would be of serious detriment to the public service if the power of the head of the Navy Department did not extend to providing for all such possible contingencies by modification or suspension of the contracts, and settlement with the contractors."

The Act of April 30, 1798, referred to in the above quotation, is still in force and effect, and will be found in the following provisions of the Revised Statutes, Section 415 being:

> "ESTABLISHMENT OF THE DEPARTMENT OF THE NAVY. There shall be at the seat of Government an Executive Department, to be known as the Department of the Navy, and a Secretary of the Navy, who shall be the head thereof."

Section 417 of the Revised Statutes provides:

> "PROCUREMENT OF NAVAL STORES AND EQUIPMENT OF VESSELS. The Secretary of the Navy shall execute such orders as he shall receive from the President relative to the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the naval establishment."
>
> Act April 30, 1798, c. 35, §1, 1 Stat. 553.

As a result under the above decision, it is clear that the Navy Department, acting through the

Secretary thereof, had the power to make the contract with the claimant in the instant case. This power, however, as above authority shows, applied merely to the Government's own contracts when it came to the jurisdiction of the Secretary of the Navy to suspend, modify cancel or settle for its own contracts. These powers the Secretary has had since the Enactment of the Act above referred to in 1798. These powers are clearly distinguishable from the powers of eminent domain and the making and enforcing of mandatory powers against third parties with whom the Government did not have contracts.

What the Government did need, under the circumstances, however, was a strong-arm power of eminent domain, and as that had to be conferred upon somebody expressly by statute, it was conferred upon the President and he subsequently delegated part but not all of his powers to others. Until the statute was passed the President had no such power, nor did any other Government department. It was intended only that the President should exercise the power of eminent domain if and when the other departments ceased to function properly under the stress of the times.

No claim is made that the Russell Motor Car Company contract was the result of a strong-arm Presidential order. It was a free and open con-

tract negotiated with the Navy Department and it must have been made within the limit of the appropriation made for the Navy for the fiscal year in question.

The words "just compensation" used in the statute strengthen the contention that that part of the bill in question was an eminent domain statute. The words "just compensation" are never found in a statute or constitution unless the provision within which they are found is an eminent domain provision.

There would be no reason for the Government to give an order to a person to furnish a ship when it already had the right to have the ship from the person by virtue of a contract entered into by mutual consent. A reading of these mandatory powers in each of the acts shows that the first one of the powers authorizes the President, within the limits of the amounts appropriated therefor, to place orders with any person for ship or material, and requires compliance on the part of any person with such orders. These orders, of course, would not apply to Government contracts since these are mandatory and do not require the consent of the person falling within their scope. The second provision of the Acts of March 4, 1917, and July 1, 1918, permits the *cancellation* of contracts under certain conditions. The Act of March 4, 1917, relat-

ing to *existing* contracts and requiring the exercise of these mandatory powers before March 1, 1918, while the Act of July 1, 1918, permits the modification and cancellation of existing contracts for six months after a final treaty of peace shall be proclaimed between this Government and the German Empire. The authority under the Act of March 15, 1917, was to expire at the same time as the Act of July 1, 1918. This court will take judicial notice of the fact that by the joint resolution of Congress, approved April 6, 1917, war was declared to exist between the Imperial German Government and the United States. It is apparent, therefore, that the Act of March 4 1917, was passed in view of the National emergency, and in order to enable the United States to get ready in the event that war thereafter be declared. The Government was, therefore, authorized to modify or cancel existing contracts with third parties in order to enable the President to carry out his powers of eminent domain in the placing of orders for material, as above stated as well as to enable him to requisition the output of factories or to take over the use of factories as provided in subdivisions 3 and 4 of this Act. These powers, however, as stated above, were to cease on March 1, 1918.

War had been declared at the time of the passage of the Act of June 15, 1917. The scope and character, however, of this Act, as discussed elsewhere in this brief, primarily, and as we

submit, exclusively dealt with the Shipping Board and with private contracts and not with Government contracts. Nevertheless, the scope of the mandatory powers of the President in regard to placing of orders, requisitioning of materials and factories, was of the same general character as contained in the Act of March 4, 1917. The same statement holds in regard to these mandatory provisions in the Act of July 1, 1918. It will thus be seen that the provisions in regard to the cancelling of contracts in none of the Acts should be held to apply to the Government's own contracts. It is true the statutes of March 4, 1917, and July 1, 1918, might be somewhat ambiguous in this regard, as the words used in those statutes contained authority to modify and cancel existing contracts; still, this provision was apparently adopted by Congress to fortify the President in his mandatory powers by virtue of which he was authorized to place orders with any person to produce ships or war material, to requisition factories and take over the use of the same by the Government, all of which powers clearly related to third persons and not to cases of where the Government had a voluntary contract with a third person for a particular purpose. If the Government itself already had the contract, then there was no need of mandatory powers.

We thus see that the scope of each of the three acts, so far as authorizing the Government to can

cel its own contracts, was never intended by Congress.

Assuming for the sake of argument, but not conceding, that the provisions of the Acts of March 4, 1917, and of July 1, 1918, which permit the President, within the limits of the amounts appropriated therefor, to "modify or cancel any existing contract," is applicable to contracts with the Government, still, the provision of the Act of March 4, 1917, would be inapplicable here, as the contract in this case was not existing at that time.

If the provision of the Act of July 1, 1918, which was in force at the time the Government sought to cancel the claimant's contract, although not in existence at the time the contract was made, should be deemed applicable to the claimant's contract, still, it cannot properly or legally deprive the claimant of its proper measure of damages, based upon the rule in force at the time the contract was made, to wit, the difference between the contract price and the cost of performance.

This would be to deprive claimant of its lawful property rights under its contract without "just compensation" and in violation of the Fifth Amendment to the Constitution of the United States.

Monongahela Navigation Co. vs. U. S.
148 U. S. 312.

Smyth vs. Ames, 169 U. S. 466 and other cases cited herein.

Claimant's property right in its contract cannot be taken without just compensation therefor.

2. *The words "to modify, suspend, cancel or requisition" as used in the Act of June* 15, 1917, *are meant to equally and consistently operate upon the same class of contracts and when these words are properly interpreted this class means contracts between third parties and not the Government's own contracts.*

The provisions of the Act of June 15, 1917, are dissimilar from those of the two above-mentioned acts, and clearly do not apply to contracts made with the Government but are applicable only to contracts made between third parties. The words "to modify, suspend, cancel or requisition," being four words which should be each operative upon the same class of contracts under the rule of construction of *ejusdem generis.*

United States vs. Salen, 235 U. S. 237 at p. 247 and cases *supra.*

The word "requisition," which concededly relates to contracts between third parties, is a clear indication of the class of contracts to be regulated by the other three words and to be consistent will only permit the application of all of these words to the class of private and not to the distinct class of Government contracts.

In *Greenleaf v. Goodrich*, 101 U. S. 278, Mr. Justice Strong, in delivering the unanimous opinion of the court, said at page 281:

> "Undoubtedly, acts of Congress in *pari materia* are to be construed with reference to each other and it may be admitted that when, in a later act, Congress uses expressions that had a recognized meaning in a former act relating to the same subject, they intended to use them in the same sense in which they were first used, that is, with their recognized meaning. But this rule has no bearing upon a case like the present. * * * As we have said, the changes of classification and of phraseology made in the Act of 1862 show an intention to take out of the mixed-material clause of the former act (which was limited to manufactures not otherwise provided for) some descriptions of goods which the act placed there * * *. Why change the language."

So why change the language of the Act of March 4, 1917, and add the words to "suspend" and "requisition" in the Act of June 15, 1917, unless it was to clearly indicate that the only class of contracts falling within the scope of the last mentioned act, were private contracts between third parties.

In Louisville and Nashville Railroad Company v. Mottley, 219 U. S. 467,

the Court states, at page 475, in discussing different phraseology in a later statute as affecting an earlier one:

"We cannot suppose that this change was without a distinct purpose on the part of Congress. The words "or different," looking at the context, cannot be regarded as superfluous or meaningless. We must have regard to all the words used by Congress, and as far as possible give effect to them."

And also in

Bugajewitz v. Adams, United States Immigration Inspector, 228 U. S. 585,

in the opinion of the court we find, at page 591:

"The change in the phraseology of the reference indicates the narrowed purpose."

In

United States v. Bashaw, 50 Fed. 749, (C. C. A., 8 Circuit),

in the court's opinion at pp. 753 and 754, is found the following language:

"If it was the intent of Congress, in passing the amendatory Act of 1873, to leave the question of compensation to the attorney unchanged, why was it that Congress struck out the words "for expenses incurred and services rendered in prosecutions for such fines and personal penalties," etc., and inserted the words found in section 838? The natural presumption is that the phraseology of the statute was changed in order to change its meaning. The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act."

The above case is referred to and cited in the recent case of

United States v. Field, 255 U. S., 257,

the court in its opinion, at pp. 264, 265, stated:

> "It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed; and none was expressed in the act under consideration. In that of February 24, 1919, which took its place, the section providing how the value of the gross estate of the decedent shall be determined contains a clause precisely to the point (§402 (e), 40 Stat. 1097): 'To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except,' etc. Its insertion indicates that Congress at least was doubtful whether the previous act included property passing by appointment. See *Matter of Miller*, 110 N. Y. 216, 222; *Matter of Harbeck*, 161 N. Y. 211, 217-218; *United States v. Bashaw*, 50 Fed. Rep. 749, 754."

F. The construction for which the Government contends that the Act of July 15, 1917, authorizes the President to cancel future contracts for "war material," including "armament," with third parties, would make the Act of July 1, 1918, "to cancel any existing contract" for the building, production or purchase of ships or "War Material" surplusage and valueless.

The provisions of the Acts of March 4, 1917, June 15, 1917 and July 1, 1918, by virtue of which

the President was given mandatory powers of eminent domain, relative to the placing of orders, requisitioning of factories and materials and cancelling contracts are in *pari materia*. If the Act of June 15, 1917, which permits the cancellation of future contracts, should be construed to apply to contracts to which the Government is a party, then clearly there was no need for the provision in the Act of August 1, 1918, wherein the President was authorized to cancel existing contracts. It will be remembered that the Government sought to cancel claimant's contract in the case at bar on November 23, 1918, when both the Acts of June 15, 1917, and August 1, 1918, were in force.

The construction submitted by claimant that the Act of March 4, 1917, and July 1, 1918, apply to "war material" including "armament" while the Act of June 15, 1917, does not apply to "armament" within its definition of "material" gives a consistent, harmonious and affective interpretation to all the provisions of these acts. The contention of the Government would create inconsistency and make some of the provisions of the acts useless and surplusage.

In

Peck v. Jenness, 7 How. 612,

the Court in delivering its opinion said at page 623:

"But it is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect contemplated by the legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together."

A good statement of the rule is found in

United States vs. Baltimore & O. S. W. R. Co., (C. C. A. 6th Cir.) 159 Fed. 33,

the court in delivering its opinion said at pp. 36 and 37:

"The construction which we propose leads to the harmonious operation of the several provisions of the statute more effectively than any other which has been suggested. And if, as no one doubts, the law is not void for uncertainty and should be given effect, our only duty is to ascertain what it means and execute it accordingly. The maxims and rules adopted for the purpose of interpreting the meaning of a statute require that we attend to all its provisions, and, if possible, attribute to the language in which each is expressed a meaning which will permit other provisions to have their due effect. This doctrine is so well settled that the rules by which it is formulated have become axiomatic. Two of them, '*ex antecedentibus et consequentibus fit optima interpretatio*' and

'*noscitur a sociis*,' are expounded in Broom's Legal Maxims at page 555 and following. A good statement of the doctrine as applied to the case before us in contained in 26 A. & E. Encycl. of L. 616 (2d Ed.), where it is said:

'In construing a section of an act, regard must be had to the language of the clause itself, and, second, to other clauses in the same act, and that construction should be adopted which makes the whole act stand consistently together or reduces the inconsistency to the smallest possible limits.'

We add some of the cases in the Supreme Court in illustration. *Pennington vs. Coxe*, 2 Cr. 33, 52; *Alexander v. Alexander*, 5 Cr. 1, 7, 8; *Market Co. v. Hoffman*, 101 U. S. 112, 116, 117, 25 L. Ed. 782; *Kohlsaat v. Murphy*, 96 U. S. 153, 159, 160, 24 L. Ed. 844; *Neal v. Clark*, 95 U. S. 704, 709, 24 L. Ed. 586."

In *Ruling Case Law*, under title "Statutes", Vol. 25, p. 1009, the rule is stated as follows:

"248. Effect of Division into Sections or Titles. The construction of a statute can ordinarily be in no wise affected by the fact that it is subdivided into sections or titles. A statute is passed as a whole and not in parts or sections and is animated by one general purpose or intent. Consequently the several parts or sections of an act are to be construed in connection with every other part or section and all are to be considered as parts of a connected whole and harmonized, if possible, so as to aid in giving effect to the intention of the lawmakers. It is a general rule in the construction of statutes that when in the early and declaratory sections the scope and extent of the power and privileges granted are once stated, the character of the grant as thus dis-

closed controls and interprets all subsequent sections, and it is unnecessary in each subsequent section to restate or use words and expressions which shall fully disclose the extent of those powers and privileges; but those subsequent sections will be understood (unless there be words of restriction and limitation therein) as coextensive with and applicable to the scope, and the full scope and extent, of the powers theretofore granted. The presence of a provision in one section of a statute and its absence from another are however, an argument against reading it as implied by the section from which it is omitted."

In *Volume 36, Cyc.*, p. 1132, under title "Statutes", we find the following statement:

"And where one part of the statute is susceptible of two constructions, and the language of another part is clear and definite and is consistent with one of such constructions, and opposed to the other, that construction must be adopted which will render all clauses harmonious."

The following cases support the rule that where two statutes are in *pari materia*, they should be construed together and effect given to all the provisions of each, provided such construction is reasonable.

Wilmot v. Mudge, 103 U. S. 217, at page 221.

"In this manner both provisions of the bankrupt law can stand and be consistent. Thus construed there is no conflict between them, and each has its appropriate sphere o

operation and the effect which the law makers intended.

The rules of construing statutes in like cases with the present are so well understood as to need no citation of authorities.

They are, first, that effect shall be given to all the words of a statute, where this is possible without a conflict; and, second, that as regards statutes in *pari materia* of different dates, the last shall repeal the first only when there are express terms of repeal, or where the implication of repeal is a necessary one. When repeal by implication is relied on it must be impossible for both provisions under consideration to stand, because one necessarily destroys the other. If both can stand by any reasonable construction, that construction must be adopted. We think that which we have already suggested reconciles the two provisions without doing violence to either."

Frost v. Wenie, 157 U. S. 46, page 58

"It is to be observed that although the words of the act of December 15, 1880, are broad enough, if literally interpreted, to embrace *all* the lands within the abandoned Fort Dodge military reservation north of the Atchison railroad, there are no words in it of express repeal of any former statute. It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the

same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute. *McCool v. Smith*, 1 Black, 459, 468; *United States v. Tynen*, 11 Wall, 88, 93; *Red Rock v. Henry*, 106 U. S. 596, 601; *Henderson's Tobacco*, 11 Wall. 652; *King v. Cornell*, 106 U. S. 395, 396."

U. S. v. Healey, 160 U. S. 136, at page 147.

United States v. Lee Yen Tai, 185 U. S. 213, p. 221.

"In the case of statutes alleged to be inconsistent with each other in whole or in part, the rule is well established that effect must be given to both, if by any reasonable interpretation that can be done; that 'there must be a positive repugnancy between the provisions of the new laws and those of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy;' and that 'if harmony is impossible, and only in that event, the former is repealed in part or wholly, as the case may be.' *Wood v. United States*, 16 Pet. 342, 363; *United States v. Tynen*, 11 Wall, 88, 93; *State v. Stoll*, 17 Wall. 425, 431. In *Frost v. Wenie*, 157 U. S. 46, 58, this court said: 'It is well settled that repeals by implication are not to be favored. And when two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a

later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore, to displace the prior statute."

Market Co. v. Hoffman, 101 U. S. 112, p. 115.

"We are not a liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."

(g) The parties to the contract never intended, believed or agreed that the Act of June 15, 1917, should apply to the contract herein.

This Court will remember that there is no statement or reference in contract 1498, or the specifications annexed thereto, that the same were made under or to be regulated by the Act of June 15, 1917.

Paragraph "Fifteenth" of the contract provides, "this contract having been awarded com-

formably to the restrictive provisions in the Naval Appropriation Act of March 4, 1917, upon the understanding * * * *" (pp. 19, 20), is a clear indication that the only specific act or statute which the parties had in mind at the time of making the contract was the statute mentioned therein. Admiral Kearney, acting Chief of the Bureau of Ordnance, Navy Department, sent the formal notification under date of November 23, 1918, to the claimant, advising it in part as follows:

> "The Secretary of the Navy having authorized cancellation of the company's contract No. 1498 for 250 3" anti-aircraft gun mounts, the company is hereby directed to cease all work in connection therewith not later than December 2, 1918.
>
> "A just and fair settlement will be made as provided by the terms of the contract and in accordance with the statute covering such cases. The details of settlement will be arranged with this bureau." (p. 125).

This Court will notice that this letter contains no reference to the statute of June 15, 1917. It contains no statement that the Secretary of the Navy purports to act under the statute of June 15, 1917. It contains no statement that the Secretary of the Navy purports to act by virtue of the delegation to him by the President of the United States of any powers granted the President under this act. It contains no statement that the Secretary of the Navy is purporting to act under and by virtue of the executive order of the President, dated August 21, 1917, (quoted *supra*), or under any other order. It contains no statement that

any action taken by the Secretary of the Navy regarding the "cancellation" of the contract is taken under any statute. The only reference to a statute in the letter is that "a just and fair settlement will be made as provided by the terms of the contract and in accordance with the statute covering such cases."

There has been statutory authority authorizing the Secretary of the Navy to, in the first instance, make proper settlements with contractors whose contracts the Government has decided not to carry out, from 1798.

United States v. Corliss Stem-Eng. Co.,
91 U. S. 321.

The written contract entered into by the parties was permanent in nature; contained no provisions for cancellation, nor any rules for measuring damages in such an event. Did not the claimant fairly have the right to assume that the Secretary of the Navy was entering into such a permanent contract in compliance with his general powers as head of the Navy Department, and that the only act that had any reference to the claimant's contract was the one specifically mentioned therein? Is not this position corroborated by the action of the Secretary of the Navy and the notice which was sent under date of November 23, 1918, when the claimant was directed to cease work under the contract? When the claimant was notified that upon its ceasing work settlement would be made as provided by the terms of the contract

and in accordance with the statute covering such cases, it had the fair right to assume that such settlement would be made in compliance with the legal principle long adopted and approved by this court, that a party to a contract, who is entitled to recover damages and compensation from the other party who refused to proceed with the contract, shall have the same based upon the difference between the contract price and the full cost of performance.

We submit that all the facts and circumstances surrounding the making of this contract, sustain the contention that under the well recognized maxim, "*expressio unius est exclusio alterius*," the distinctive incorporation in the contract of the restrictive provisions of the statute of the Naval Appropriations Act of March 4, 1917, excluded from being a part of the contract the various other provisions of other statutes, including the provisions of the Act of June 15, 1917. The contract and specifications were prepared by the Navy Department and when doubtful should not be construed to incorporate therein or to have the same regulated by doubtful and ambiguous statutes which certainly were not in the contemplation of the Secretary of the Navy, or any officer of the claimant. The construction of these acts had never been up in this Court for determination. Indeed, the Court of Claims, itself, in April, 1921, was of the apparent opinion that the Act of

June 15, 1917, did not apply to contracts such as the one in this case.

College Point Boat Corporation vs. U. S., 56 C. Cls. 218.

Later the Court in the Meyers Scale case *(supra)* and in the present one, reversed itself. Why, however, should the claimant be deprived of its clear and unambiguously expressed contract rights by the unreferred to, undiscussed and unconstrued provisions of the Act of June 15, 1917, giving the President mandatory powers to be exercised in certain specific cases.

So many reasons for the inapplicability of this Act to the instant case have been pointed out above, that we respectfully submit this Court will not deprive the claimant of its just right to compensation based in accordance with law upon the difference between the contract price and the cost of performance.

POINT III.

Assuming but not admitting, that the Government is right in its position that the cancellation of the contract involved is governed by the provisions of the Act of June 15, 1917, which relate to "emergency shipping fund," still the Court of Claims erred in its findings of fact and conclusions of law, in that it did not measure the "just compensation" to which claimant is entitled in its judgment by the difference between the contract price and the cost of the full performance thereof to it.

The term "just compensation" is one that is taken primarily from the Constitution of the United States and has been generally adopted in the constitutions of various states, as pointed out in the Monongahela case *(infra)*. Compensation is required to be made for and should be included to cover the equivalent of the property taken. If in the case at bar, the plaintiff's contract had been with a party other than the Government, and the Government deprived it of its power to complete the same, then just compensation, or the equivalent of the property taken, would necessarily have included compensation to the plaintiff for its future profits and it would have been entitled to be compensated in accordance with the rule of damages laid down in Purcell v. United States *(supra)*. Is the damage to the claimant any less because its contract is can-

celled by the Government and made with the Government, than if it were cancelled by the Government and had been made with a third party? We submit clearly no.

That small part of the Act of June 15, 1917, relating to "Emergency Shipping Fund" does not give the President, or such agency as he may choose, the unconditional right to cancel a contract which creates directly with, and makes a part of the use of this mandatory power the equally mandatory obligation upon, the United States to make "just compensation" to the person entitled to such compensation, which, in the first instance, is to be determined by the president, but if such amount so determined is unsatisfactory to the person so entitled, then 75% thereof is paid by the United States to such person who is given by this very statute the lawful right to sue the United States for such further sum in addition to the said 75% as will be "just compensation" to the person who has been deprived of his property by virtue of this mandatory power of eminent domain.

The law does not provide that the Government has the unconditioned, absolute and untrammeled right to cancel the contract without paying the "just compensation" to the claimant for depriving it of its right to carry out and fulfill its written contract. Nor does the law provide that in estimating the "just compensation," no damages will be allowed for "anticipated profits", as de-

fined in the "Dent Act" in adjusting a contract "upon a fair and equitable basis." The Dent Act, in substance, allows a claimant damages on the basis of a *quantum meruit* simply to the date on which the contract is cancelled. The term "just compensation" in the Constitution of the United States and in the various state constitutions has never been interpreted in this Court, or do we know of any case in any other court, in a manner that would deprive a person whose contract is appropriated, of his legitimate clear profit based upon the difference between the contract price and the cost of performance. Either Congress in passing the statute of June 15, 1917, or the Navy Department in its contract, would have been at perfect liberty to have inserted such provisions, either in the Act or in the contract, and if the claimant had thereafter entered into the contract (it being conceded for the sake of this argument that the Act applied to the Government's own contracts and not simply to private contract), that the claimant would not be entitled to its compensation as here contended for. Such is not the case here. Claimant's contract, from all that appears upon the fact thereof, was never entered into by virtue of the "Emergency Shipping Fund" provisions of the Act of June 15, 1917. This Court may possibly construe this Act so that claimant's rights may be subject to appropriation under latent powers of eminent domain conferred upon the President. The grant-

ing of such mandatory powers, however, did not and does not decrease or diminish the value or extent of the claimant's rights under its contract including that of performing the same.

These latent powers conferred upon the President under the provisions of this Act, were merely intended to authorize the President to lawfully direct the claimant to stop work under its contract and thereafter to "value" the "rights of the claimant in its contract" and in the place of permitting the full performance thereof, to give the claimant "the full and perfect equivalent for the property taken," "determined by its productiveness—the profits which its use brings to the owner." In this Act Congress intended to endow our soverign Government with authority to lawfully condemn contracts so that persons who had contracted with the Government would not heap odium upon or criticise the President or his duly constituted agency for mandatory orders appropriating factories and their output or cancelling contracts without authority in law.

The machinery created by the "Emergency Shipping Fund" provisions may properly be argued to have given legal color to the cancellation of contracts instead of having the Government sued for an unlawful breach of the contract within the principles and along the lines sustained by this Court in the case of United States v. Purcell *(supra)*.

Congress, however, if it made claimant's contract subject to the Government's powers of eminent domain, never thereby, we submit, intended to lessen the value of claimant's property rights, nor to deprive it of its right to complete its contract by virtue of the authority conferred upon the President in the "Emergency Shipping Fund" provisions of the Act of June 15, 1917.

The Act coupled with the right of appropriating and cancelling claimant's contract created the duty upon the United States to pay "just compensation" therefor. Congress, we submit, no more intended to lessen the value of the claimant's contract or deprive it of its right to perform the same by this Act without paying a full equivalent therefor as "just compensation" than it intended that the claimant could be deprived of its factory, existing leases and contracts, without the Government paying full value therefor, provided the same were condemned either by the Secretary of the Treasury for the purposes of public buildings or lighthouses, under the Act of March 3, 1883, c. 143 (22 Stat. 605) or by the Secretary of War in its authority to him to condemn lands for aviation purposes under the Act of August 29, 1916, c. 418 (39 Stat.). Clearly if the Secretary of War or the Secretary of the Treasury had condemned the claimant's plant and contract, the United States would have been required to pay as "just compensation" therefor; the value of its right to perform its contract, to wit, the difference between the contract price and the cost of full performance.

Powers of eminent domain existed in the Secretary of the Treasury and the Secretary of War at the time claimant entered into its contract and it is to be assumed that claimant must be held to have contracted in the light of the powers of eminent domain theretofore conferred upon the United States. We doubt even if the Government contended that if claimant's contract had been taken by the Government under its powers of eminent domain upon paying just compensation under other provisions creating powers of eminent domain, than those specified in the "Emergency Shipping Fund" paragraphs of the Act of June 15 1917, the claimant would not have been entitled to its compensation as herein claimed for.

How then can it be fairly contended by the Government that the value of the claimant's rights appropriated, are any less or any different or that it is not entitled to the same just compensation when the powers of eminent domain are created and exercised by the President under the head "Emergency Shipping Fund" provisions?

The Act of June 15, 1917, authorized the President to appropriate, lawfully, factories, their output, materials, ships, and the "charter of such ship," for the purpose of carrying on the war, but the obligation of paying just compensation was simultaneously created. Would this court sustain the contention that if the United States appropriated or cancelled the charter of a ship, the owner

of which had existing contracts for freight which would have yielded a handsome profit, that "just compensation" to the owner would not have entitled him to the profit that his use of the ship under his contract would have given him? We submit clearly no, otherwise the owner would have been deprived of his property without just compensation in violation of the fifth amendment to the Constitution of the United States.

The terms "just compensation" in the Constitution of the United States, as well as in the various states, have always been held to entitle a claimant to the full and perfect equivalent of any of his property taken, including his right to clear profits of which he may have been deprived by the exercise of the powers of eminent domain. These provisions of "just compensation" have never been construed or intended to alter or change the value or extent of the property condemned or appropriated. The fact that claimant may be held to have made its contract in the light of the possible exercise by the President of his mandatory powers to cancel the same in carrying on the war upon making "just compensation" does not deprive it of knowledge which it may assume to have had that the highest courts in our lands, including this Honorable body, had determined that when a person is deprived of his contract rights by virtue of the powers of eminent domain, that the terms "just compensation" entitled it to receive the full and perfect equivalent of his property and the profits which

its use or the profits which in this case the Court of Claims has found as a fact, this claimant would have made by its full performance of the contract in question, except for being stopped by the Navy Department.

We respectfully submit for this court to place a contrary interpretation on the provisions contained in "Emergency Shipping Fund" contained in the Act of June 15, 1917, would not be in accordance with its former rulings, but would deprive this claimant of a valuable and clear property right which it fairly and honestly owned and of which it should not be deprived without giving it the "just compensation and profit" to which its use entitled it.

Authorities will be cited later in this point which we respectfully submit sustain and fortify our contention.

As stated in Hollerbach v. United States, 233 U. S. 165, at pages 171, 172:

> A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument."

It cannot fairly be denied that in many cases there would be no other loss from the cancellation except loss of profits, and that the provision for just compensation to the contractor could

not be enforced without an allowance to him for loss of profits. For example: suppose a profitable contract in which the Government furnished the plant and the materials and the contractor the labor only, and for the performance of which no special outlay by the contractor was required. Suppose the cancellation of this contract by the Government when four-fifths completed—all earned compensation having been paid up to that time. How, in such a case, would it be possible to compensate the contractor except by an allowance for his loss of profits in respect to the uncompleted portion of the contract? Is he to be told that his paid compensation for the completed portion includes compensation for the cancelled portion also?

The decision in question would make it necessary, in allowing just compensation to distinguish between private contractors and government contractors, when there is nothing in the Act to justify the distinction. For example: suppose the requisitioning or commandeering of a plant engaged in the performance of a profitable private contract, and the operation of the plant by the Government for its own purposes. How would it be possible to give just compensation to the owner and contractor in such a case without an allowance to him for the loss of his profits on the work that was in progress? How could a reasonable allowance for the seizure of his property be made without taking into consideration the loss

resulting from the destruction of his business? Or, suppose the commandeering of a contract between private parties for the manufacture of an article on which the contractor was making a profit of fifty per cent. Would not the United States, seizing the whole of the contractor's output of that article, be required in common honesty to pay him a price for the article that would yield him a profit of fifty per cent? If the Act applies to Government contracts as contended by the defense, as well as to private contracts, it makes no distinction between them as to the just compensation to be awarded the contractor. Has the court the right to make such distinction and say that, in the case of the private contractor there may be and in that of the Government contractor there may not, be an allowance for loss of profits?

Because there is no authority to allow compensation beyond the contractor's actual outlay except in those cases in which the contract was a profitable one the allowance must necessarily include prospective profits. If the contractor was so lacking in judgment as to make a contract at a figure that would leave him nothing over and above his expenses, including those for special facilities, the cancellation of that contract would be a benefit to him, and hence afford no ground of recovery against the Government.

Assuming (but not conceding) that the Act of June 15, 1917, might be interpreted as authorizing the Government to cancel claimant's contract in the case at bar on making "just compensation" as

therein provided, it is clear that this being an eminent domain act, the claimant's contract is a property right entitled to the protection of the Constitution of the United States. The claimant could only be lawfully deprived of its contract by paying it the damages to which it was entitled by law. In other words, the claimant, under the definition of "just compensation" is entitled to have its damages estimated in accordance with the rules laid down in *Purcell vs. United States (supra)*, and other cases cited herein.

> "Having taken the lands of the defendants in error, it was the duty of the Government to make just compensation as of the time when the owners were deprived of their property. *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 341."
>
> *United States v. Rogers*, 225 U. S. 163, p. 169.

> *Monongahela Navigation Co. v. U. S.*, 148 U. S. 312.

This was a proceeding to condemn a lock and dam of the plaintiff company. Held: The company was entitled to recover compensation from the United States for the taking of the franchise to exact tolls, as well as for the value of the tangible property taken, under the provisions of the Fifth Amendment to the Constitution. On page 325 and following, Brewer, J., said:

> "The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the government, the last, the one in point here,

being, 'Nor shall private property be taken for public use without just compensation.' The noun 'compensation' standing by itself carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property, and not the owner. Every other clause in this Fifth Amendment is personal. 'No person shall be held to answer for a capital, or otherwise infamous crime,' etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the 'just compensation' is to be a full equivalent for the property taken. This excludes the taking into account, as an element in the compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it, to stand as a declaration, that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner.

* * * * * * * * * * *

"How shall just compensation for this lock and dam be determined? What does the full equivalent therefor demand? The value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner. Various elements enter into this matter of value. Among them we may notice these: Natural richness of the soil as between two neighboring tracts—one may be fertile, the other barren; the one so situated as to be susceptible of easy use, the other requiring much labor and large expense to make its fertility available. Neighborhood to the centers of business and population largely affects values. For that property which is near the center of a large city may command high rent, while property of the same character, remote therefrom, is wanted by but few, and commands but a small rental. Demand for the use is another factor. The commerce on the Monongahela river, as appears from the testimony offered, is great; the demand for the use of this lock and dam constant. A precisely similar property in a stream where commerce is light, would naturally be of less value, for the demand for the use would be less. The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owner. For each separate use of one's property by others, the owner is entitled to a reasonable compensation; and the number and amount of such uses determine the productiveness and the earnings of the property, and, therefore, largely its value. So that if this property, belonging to the Monongahela Company, is rightfully where it is, the company may justly demand from every one making use of it a compensation; and to take that property from it deprives it of the aggre-

> gate amount of such compensation which otherwise it would continue to receive."

So in the case at bar "just compensation" to claimant means the "full and exact equivalent" "determined by its productiveness—the profits which its use" would give the claimant. This undisputably would be the sum of $726,120.15, to-wit the difference between the contract price and the cost of full performance to the claimant.

Most of the authorities dealing with the right of an owner to his profits or the productive use of his property, have come before this Court in cases where the value of the property of public utilities has been involved either in connection with the fixing of rates or actions of state or federal bodies confiscating their property. In all of them, however, the proposition has been recognized that an owner is entitled to the profits which the use of his property tangible or intangible would give him. The United States can only deprive the owner of it by paying "just compensation" as required by the 5th Amendment to the Constitution of the United States.

In *Cleveland Railway Co. vs. Backus,* 154 U. S. 439, 445, a taxation case, it is said:

> "But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results

from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put."

In *Cotting vs. Kansas City Stock Yards*, 183 U. S. 79, the court said of the man engaged in operating a public utility:

"He has a right to do business. He has a right to charge for each separate service that which is reasonable compensation therefor, and the legislature may not deny him such reasonable compensation, and may not interfere simply because out of the multitude of his transactions the amount of his profits is large. Such was the rule of the common law even in respect to those engaged in a quasi-public service independent of legislative action. In any action to recover for an excessive charge, prior to all legislative action, who ever knew of an inquiry as to the amount of the total profits of the party making the charge? Was not the inquiry always limited to the particular charge, and whether that charge was an unreasonable exaction for the services rendered"?

The court further said:

"It does not follow therefrom that the legislature has power to reduce any reasonable charges because by reason of the volume of business done by the party he is making more profit than others in the same or other business. The question is always not what does he make as the aggregate of his profits, but what is the value of the services which he renders to the one seeking and receiving such services."

In *Reagan vs. Farmers' Loan & Trust Co.*, 154 U. S. 362, 410, 412, a confiscation case, it is said:

> "If the State were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at less than its *market value*"? * * * * "*And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others*".

It is manifest that this statement could not have been made if the court had understood that the earning power of the road was not a factor for consideration in the determination of its value.

In *Adams Express Co. vs. Ohio State Auditor*, 166 U. S. 185, the express companies there involved were found to have tangible property of the total value of $4,189,818.57. They claimed that taxes should be levied against them on that basis. It was found, however, that the properties of these companies possessed large intangible values based largely upon their earnings. The court said, page 220:

> "Now, it is a cardinal rule which should never be forgotten that whatever property is

worth for the *purposes of income and sale* it is worth for purposes of taxation."

In *Smyth vs. Ames*, 169 U. S. 466, a confiscation case, the rule laid down by the court makes it mandatory that in the determination of the value of a railroad property *its earning power* and its structural value must both be considered. The court said, page 546:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be *the fair value of the property being used by it* for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, *the amount and market value of its bonds and stock*, the present as compared with the original cost of construction, the *probable earning capacity of the property under particular rates prescribed by statute*, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon *the value* of that which it employs for the public convenience."

Galveston Electric Co. vs. City of Galveston, Supreme Court, U. S., decided April 10, 1922.

In *Galveston Electric Co. v. City of Galveston*, Supreme Court United States, October Term, 1921, Decided Apr. 10, 1922, advance opinions, Vol. 13, p. 382, the Court said:

> "In determining the value of a business, as between buyer and seller, the good will and earning power due to effective organization are often more important elements than tangible property. Where the public acquires the business, compensation must be made for these; at least, under some circumstances. *Omaha v. Omaha Water Co.*, 218 U. S. 180, 202, 203, 54 L. Ed. 991, 1000, 1001, 48 L. R. A. (N. S.) 1084, 30 Sup. Ct. Rep. 615; *National Waterworks Co. v. Kansas City*, 27 L. R. A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853, 865."

A few cases to the same effect:

See

Wilmington Railroad vs. Reid, 13 Wallace 264;

Adams Express Company vs. Ohio State Auditor, 165 U. S. 194;

Omaha vs. Omaha Water Co., 218 U. S. 180;

Cedar Rapids Gas Light Case, 223 U. S. 655;

Minnesota Rate Cases, 230 U. S. 352;

Des Moines Gas Case, 238 U. S. 153;

Denver Union Water Co. Case, 246 U. S. 178;

Cudahy Packing Co. vs. Minnesota, 246 U. S. 450.

The Dent Act [40 Stat. 1272] Supports Claimant's Contention.

(B) That Congress, itself, appreciated that "just compensation" should properly include damages based on the difference between the cost of performance and the contract price, or anticipated profits as called by some, is evidenced by the entirely different provisions adopted by Congress in the Dent Act of February 2, 1919, (40 Stats. 1272). This act, as the court well knows, provided for the legalizing, adjusting and discharging of agreements, express or implied, "upon a fair and equitable basis" that were entered into prior to November 12, 1918, when such agreements had not been executed in the manner prescribed by law. In the event that settlement was not made by the Secretary of War, then the Court of Claims was given jurisdiction and was authorized to make an award of fair and just compensation, as specified in section 1 of the act. Section 1 of the act provides:

> "Provided that in no case shall any award either by the Secretary of War or the Court of Claim, include prospective or possible profits on any part of the contracts beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order."

This phraseology is far different from the use of the terms "just compensation" in the Acts of

April 4, 1917, June 15, 1917, and July 1, 1918. Congress in legislating in regard to the amount of damages to which a contractor was entitled was not interpreting or confirming the terms "just compensation" in the former acts, it was specifically adopting in the Dent Act in very terms a new basis which it declared to be "a fair and equitable basis" and in adopting this rule, it departed from the language of the former acts, clearly indicating that without the specific language excluding from consideration anticipated profits, that the language of the former acts, to-wit: "just compensation" would require the inclusion of anticipated profits and the adoption of the legal rule of damages based on the difference between the cost of performance of a contract and the contract price.

Some authorities have been cited above sustaining this rule of construction.

The courts indicate that statutes in *pari materia* are to be considered as a whole in interpreting their respective provisions and that sometimes the language of a later statute may be interpretive of the provisions of an earlier statute and establish that the earlier statute was intended to cover certain matters that were interpreted as included by the later statute. These cases, however, do not apply where the later statute uses different language and different provisions. In such a case under rules of construction, the courts will draw the conclusion that the earlier statute was intend-

ed to include the matters which the latter statute excluded.

In *Montclair vs. Ramsdell*, 107 U. S. 147, the court said in its opinion at page 152:

> "It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed. We should assume that the legislature was aware, when the Act of April 15, 1868, was passed, that a previous statute had expressly excepted Bloomfield Township from all of its provisions. When, therefore, they declared that the new township should come under the operation of *any* act from which Bloomfield had been specially excepted by any provision thereof, the established canons of statutory construction require us to presume that the legislature understood the full legal effect of such a declaration. The purpose, manifestly, was to relieve the new township from the disabilities imposed by the bonding act upon the township of Bloomfield as then established."

In other words, it was clearly within the jurisdiction of Congress to provide in the Acts of March 4, 1917, June 15, 1917 and July 1, 1918, that in determining "just compensation" a settlement should be made upon an "equitable basis" and remuneration made merely for expenditures and obligations or liabilities incurred in performing or preparing to perform the contract or order and not to include prospective or possible profits on

any part of the contract beyond the goods and supplies delivered to and accepted by the United States. If such had been the intention of Congress it was easy to so provide and this litigation would never have occurred. It was equally easy for the Government, in the contract itself, to make provisions authorizing it to cancel the contract and to provide that in such an event anticipated profits would not be paid. In fact, as this court probably knows, most of the recent war contracts made by the War Department contained provisions substantially along these lines.

C. Assuming but not admitting that the statute of June 15, 1917, is applicable and that the construction of this court may be that the term "just compensation" does not include "anticipated profits," still, we contend that as a matter of law the Court of Claims erred in not including in its just compensation when fixing the same at $495,250.34, the additional sum of $96,041.50, being the profit that the claimant was in a position to make and could have made by the delivery of the 25 mounts in October and November, 1918, and prior to the cancellation of this contract, and which said mounts it would have delivered under the contract in this case, except for the changing of the schedule of deliveries as mutually agreed upon between the parties, as shown in the letters exchanged and set forth in detail in Finding of Fact IX (Fols. 184-185).

When contract 1498 was cancelled, it is clear that had the 25 gun mounts been applied on contract 1498, which really, in the first instance, belonged to that contract, the Navy officials would still have allowed contract 949 to have proceeded

to completion, and that the plaintiff would have fully carried out the same, as in fact it did

The application of the 25 gun mounts made in October and November, 1918, on contract 1498, would not have affected in any way the ability of the claimant to carry out contract 949.

This would have meant that the claimant would have received the profit to which it was entitled on the 25 gun mounts applicable to contract 1498, and would also have had the profits on the complete contract 949, as well as enjoying the advantage that would have come to it from spreading the overhead expense, etc., over an additional 25 mounts. The company certainly, in respect to contract 1498, is entitled to the profit that its books and records show it was in a position to earn on 25 gun mounts that it was in position to deliver and actually did deliver, although they were counted in the settlement as part of contract 949. To this measure of damages the claimant, we submit, is equitably and fairly entitled, not as anticipated profits, but for profits and services on work actually completed and done under its contract.

This is not a case of double profits on the same article but would give the claimants the right to profit under each contract, but on contract 1498 would only be allowing profit on the 25 mounts that it had in readiness and could have delivered

in October and November, 1918, without affecting its deliveries or ability to complete contract 949.

It will be remembered that the change in the schedule of deliveries was not brought about through any fault of the claimant, but was made necessary by reason of conditions beyond claimant's control, as pointed out in its letter of September 18, 1918, to the Navy Department (Fol. 184). In amending the schedule of deliveries, the handling of the records and manufacturing parts under both contracts were being simplified, and this would accrue to the Government's benefit, as pointed out in the same letter of the claimant, and as found by the Court of Claims in Finding of Fact IX, as follows, to wit:

> "The plaintiff company manufactured and was able to deliver to the United States in the month of October, 1918, ten gun mounts under contract 1498, and manufactured and was able to deliver under said contract fifteen gun mounts in the month of November, 1918, and would have made such deliveries on said contract but for the consent of the United States to changed deliveries as set out in the above correspondence and to application of said ten and fifteen gun mounts on contract 949. Relying upon the consent of the United States to said amended schedule of deliveries said ten and fifteen gun mounts so manufactured in October and November, respectively, with all other mounts manufactured during those months, were delivered to the United States to apply on said contract 949." (p. 124).

We, therefore, submit that it is highly inequitable even under the most extreme interpretation of the words "just compensation" to penalize the plaintiff and deprive it of profits on the 25 mounts that it had actually made and had on hand at the time the Government cancelled its contract. But for the cancellation of the contract the claimant would have performed both contracts and would have secured, and been lawfully and equitably entitled, to its profits on both. We, therefore, respectfully submit that the Court of Claims erred in not including in its judgment of $161,614.58, as the balance due the plaintiff, the further sum of $96,041.50. We present this last proposition to the Court's consideration with considerable hesitation, since by so doing we do not mean to impair or limit the arguments made elsewhere in this brief that the claimant is clearly entitled to have its damages figured on the basis of the difference between the cost of performance and contract price, which would entitle it to have the judgment of the Court of Claims increased by the sum of $726,120.15. In this event, the contention here made in regard to the damage sustained by the plaintiff on the 25 mounts, or the sum of $96,041.50, would have no bearing as this last mentioned figure is included in the larger amount. We only raise this question in the event that this Court decides against our claims on every other ground and contention, and believe that in such an event there will be no reasonable ground for refusing to give claimant damages for its loss of

profits on 25 gun mounts that it had on hand ready for delivery at the time the Government cancelled the contract.

D. The claimant's position protects its lawful rights and still is equitable to the United States.

This Court will recognize the fact that the Navy's cancellation of this contract and refusal to take the gun mounts and sights covered thereby, unquestionably saved the Government a large amount of money even if the claimant receives in this case its damages based on the difference between the cost of performance of the contract and the contract price. If the claimant had completed all the guns and delivered them to the Government, it would have been paid the contract price, [nearly three times the amount of the claimant's damage now asked for] which would have, of course, included the money for the additional work, labor and other expenses necessary to the full performance of the contract. Its profit would have been the same as claimed in this case; still the Government might have been in possession of considerable useless material which it in all probability would have been required to sell or dispose of at an additional loss beyond the payment to the claimant of its contract price. The recent and enormous loss sustained in the sale of over $300,000,000.00 of ships for $750,000.00 by the Government, emphasizes the saving to the Government of not being required to take actual delivery of

the gun mounts and sights in the case under consideration, and, still, properly award compensation to the claimant for its loss and damages estimated and figured in accordance with the recognized rules of law.

The claimant, financed by Canadian capital and administered by those trained in war time manufacture, was formed solely for the purpose of carrying out these armament contracts with the United States. The corporation had no other business and abandoned its plant upon the finishing of its contracts.

We submit it would deprive the claimant of its lawful contract rights unless this court awards it compensation measured by the difference between the contract price and the cost of its full performance.

POINT IV.

The judgment of the Court of Claims should be reversed and the case remanded to the court with directions to amend its judgment so as to award and decree that the plaintiff-appellant is entitled to recover from the United States the sum of $887,834.73, together with such other relief and judgment as may be just.

LYMAN M. BASS,
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APPENDIX.

"EXHIBIT A."

EXTRACTS FROM CONGRESSIONAL RECORD

65th Congress, First Session
Volume 55, Part 3.

* * * * * * * *

Page 2511.

"Mr. Nelson: * * * Mr. President, this bill contains some very unusual and far reaching provisions * * * . It authorizes the President —which of course in this case means the Shipping Board—(b) within the limits of amounts here; be authorized to modify, cancel or requisition, etc. It not only authorizes the Shipping Board to take possession of the ships which have been partially completed, to commandeer them, but it authorizes the Board to change and modify contracts which have been made between the ship builder and the man who has a ship in process of construction."

Page 2512.

"Mr. Underwood: * * * We rejected the general legislation which we were asked to consider, but incorporated in the bill appropriations that are really within our jurisdiction. Probably the only portion of this bill that was originally within our jurisdiction was the appropriation for the merchant marine or the carrying on the work of the Shipping Board.

Mr. Hardwick: Mr. President, I should like to suggest to the Senator, too, that in

times of war and for the purposes of war it is just as necessary to have a merchant marine for war purposes as it is to have a Navy, and that is the only thing we undertook to do."

Page 2513.

"Mr. Underwood: * * * We have to get the ships now building off the ways and operate the shipyards with three shifts in order to expedite the construction * * *. I want to say to Senators that, if this war is to be a success, the first question and the last question to be considered is ships, ships and more ships. We cannot start the war without ships and we cannot successfully conclude it without ships."

Page 2515.

"Mr. Calder: Can the Senator tell me what is to be the policy of our Government towards these ships that are under construction?

Mr. Underwood: In regard to taking these ships?

Mr. Calder: Yes.

Mr. Underwood: I cannot speak by the card on that. I shall be glad to give the Senator such information as I have. I know that our Government wants to clear the ways of the ships that are on them—that is the most important question—so that they can be used. Most of these contracts have been made on an 8-hour basis, with one shift a day. Our Government wants to put the work on a two or three shift basis so that we will expedite the building of the ships and make as great a use of the ways as possible. This bill provides for expediting the building of these ships. My information is, although I do not speak with any authority, that those ships that are nearing completion will be allowed to be completed

in their usual course, and go to the corporations or men or countries that have already contracted for them. But ships that are just beginning and may occupy the ways for a considerable time, will probably be commandeered under this bill, in order that the Government may handle those ships, expedite them as rapidly as possible, and clear the ways to put their shipping in.

* * * * * * *

Mr. Underwood: From the evidence before the Committee, I do not think that power will be used. From the evidence that came before the Committee, I think it is clear that General Goethals intended to build these ships by way of contract with the usual method but he wants the power to accomplish the results if he can not do it the other way."

Page 2515.

"Mr. Underwood: They will not be interfered with if they are nearing completion. I will say to the Senator that my understanding is, from the testimony given before the committee, that most of these ships that are on the ways belonging to foreign nations are really for the Government of Great Britain, although the contract is not made in the name of the Cunard Co. There may be some few ships of foreign nations. If they are nearing completion, my understanding is that it is not the purpose of this Government to interfere with the contracts; but if they are not, and we have got to get the yards for the purpose of expediting matters, the contract will probably be taken over."

Page 2516.

"Mr. Weeks: Let me ask the Senator if all the shipyards in the United States are not now working at full capacity?

Mr. Underwood: Our information is that they are not. That they are working at full capacity on a single shift, an 8-hours a day shift; but what our Government wants to do is to make them work on two or three shifts a day."

Page 2518.

"* * * Mr. President, there is no danger in conferring the powers described in the shipping clauses of this bill. There is no danger except to the United States, if they be withheld. The power, in my judgment, will never be used to its maximum extent. I doubt whether it will ever be drawn upon largely at all, because when you come to analyze it, it is only after all the power of the Government to utilize the facilities of the shipyards of the country and of those enterprises which produce iron, steel, and other materials that go into the construction of ships, so that the Government may be served promptly and effectively."

* * * *

"I doubt, sir, whether it will ever be necessary for the President of the United States to commandeer any shipyard, any rolling mill, any steel works, or any other factory in the United States to expedite this work, but it is a good thing in the event of the unforeseen happening that he shall have that power."

Page 2524.

"Mr. Stone: Why could not the foreign government pay the money as well as our government to expedite the construction?

Mr. Hardwick: It can and it ought to and it is the intention of this section that it shall. It was merely intended, as we amended it in the Committee, to expend these funds to ex-

pedite the construction of these vessels. * * We did not think and we do not believe the Senate will think, or Congress will think, that we ought to take this tremendous power to commandeer men and material and factories and put it at the disposal of any foreign government or any subject or citizen of a foreign government. We were willing to confer it for the construction of American ships, but not for the construction of British ships, whether owned by the British Government or by a British corporation. * * I do not think they ought to use it except in those cases where it is impossible by the mere use of money alone to so speed up British construction as to meet the demands and the requirements and necessities of the hour. If there are such cases where money alone will not accomplish it, then we ought to take them over no matter what government owns the contracts or what firms or corporations are interested in them."

Page 2525.

"Mr. Underwood: * * * * As everybody knows, the private owners of ships today are not anxious to sell their ships, notwithstanding the danger of submarine warfare. In fact, we have to put provisions into this bill conferring the right to commandeer in order that we may be sure of getting the ships."

Page 2525.

"Mr. Smoot: Does the Senator really believe that if the President of the United States should ask England to expedite the building of these ships, England would not do it?

Mr. Underwood: Well, I have no doubt of England's doing it, but there are private con-

tracts which exist between the shipbuilding companies of this country and the Cunard Steamship Line. When General Goethals tells us that it is of the utmost importance that he be given this power, I do not think he wants the power simply for the purpose of trying to coerce the British Government, when he says that the British Government is prepared and ready to cooperate with him in this respect. There is something else behind it, and there is something else behind the fact that we have to fight here to get the power to commandeer these ships."

Page 2527.

Mr. Martin: * * * I trust that the Senate will vote down the amendment that is offered by the Senator from Utah, the object of which is to take away from General Goethals the discretion which the bill as reported gives him, to take over these ships if he thinks it well to do so. He says he will not take over those that are nearly completed, but those that have a long distant date for delivery he wants to take over, because he wants the ways. He not only wants these ships quickly constructed by expediting their construction, so that we may have the use of them, but he wants to put more ships on those ways."

Page 2527.

"Mr. Kellogg: Mr. President, I shall take only a moment of the Senate's time.

We are here making an appropriation of $750,000,000. We are proposing to give the President the right to commandeer the shipyards of this country and the ships being built by private individuals, and I cannot see why

we should hamper this program by excluding the ships contracted for by Great Britain. If we are going to make any such appropriation as that—and we are going to do it—and grant these powers, it seems to me we had better not hamper the administration with any restrictions as to what ships, of what governments, we shall take over."

Page 2527.

"Mr. Phelan: Mr. President, I do not intend to delay the Senate, but as a matter of information I am in position to communicate a fact. I learned today, and have already made representations to the State Department on the subject, that on May 15 the British Government instructed its brokers not to allow the transfer of neutral ships or charter parties to any ownership but British ownership. An American firm had entered into negotiations a week ago, the terms were satisfactory, the neutral owners desired to sell, the negotiations having been delayed for an unreasonable time, the American merchant inquired by cable and learned that on May 15 the British Government had forbidden the transfer of neutral ships or charter parties to American owners * *. Having in view not only the exigency of the moment, but ultimately the supremacy of our ships upon the seas, I think it is a matter of great importance that we should adopt the Committee's recommendation, which is also the recommendation of the President."

Page 2529.

"Mr. Underwood: * * The Committee's bill is perfectly fair as it is written. It provides that any ship that is commandeered or

any shipyard or anything else that is commandeered shall be paid for at a reasonable price to be agreed on between the President or those acting for him, and the owner. * *

Mr. Weeks: I wish the Senator to remember that we are commandeering property.

Mr. Underwood: Undoubtedly."

Page 3015.

"After introducing the bill, which had been amended in conference, Mr. Fitzgerald stated:

"* * The proposed amendment which the House is asked to adopt is simply the rearranging the Senate Amendment in more logical form and differs from it in four principal respects: first, it gives power to suspend contracts as well as to cancel, modify or requisition. In the Senate provision there was no authority to suspend a contract between private parties, which might interfere with the Government requisitioning or requiring work to be done."

Page 3015.

"Mr. Fitzgerald: * * This legislation is of a very radical, unique and unusual character. It confers the most comprehensive powers ever proposed upon the President of the United States. It authorizes him to requisition the entire output of a factory, a portion of a factory, to take over ships, to cancel contracts, to assume contracts, to suspend contracts, to operate these ships, and when the powers given here are exercised, provision is made to make just compensation for the taking over."

Page 3015.

"Mr. Fitzgerald: * * * Under the Senate amendment the President is authorized to delegate all of those powers of a radical and comprehensive character to the general manager of the United States Shipping Board Emergency Fleet Corporation. That is a corporation organized by the Shipping Board under the authority conferred by the shipping act for the purpose of having constructed ships deemed essential at this time."

Page 3016.

"Mr. Fitzgerald: They expect to get all of the trained mechanical help needed, and if necessary under this bill, the President will have the power to suspend contracts where labor is utilized that can be utilized in shipbuilding, in order to get that labor diverted to the shipping work. That is one of the purposes of authorizing the suspension of contracts."

Page 3019.

"Mr. Fitzgerald: * * A paragraph was inserted in the Senate Amendment, the purpose of which was to enable the Navy Department to requisition, to commandeer ships, that are essential for certain purposes connected with the Navy. There is no such power now. In the rearrangement of this Amendment, that power is retained and the authority of the President to delegate this power or exercise it through such agency or agencies as he may determine proper is intended to permit him to exercise that part of the power intended for the Navy through the Navy Department, and provision is also made that if any vessels are commandeered under this

power for the Navy Department or for the War Department, payment, etc. * * There are a great many other questions for which provision must be made; questions of very great importance. The Committee on Appropriations when it was confronted with the question of considering the Senate Amendment determined that the only authority it would include in the bill was that authority necessary to enable the ships to be secured rapidly with the commandeering powers, and that if further legislation would be necessary, other very important questions ought to be left to consideration in a bill that should not come from the Committee on Appropriations."

Page 3022.

"Mr. Smith: Suppose a steel company is now manufacturing steel for some purpose that is not in connection with the war, and not for the purpose of carrying on the war, and suppose the Government wants to cancel contracts of that character and take the steel for ships or to build cars, should not the Government have the right to cancel those contracts?

Mr. Lenroot: Absolutely, and that far I am not making the slightest objection.

Mr. Smith: Does this do more than that?

Mr. Lenroot: Yes, it does. For instance, a building is being erected in my town, the contractor owns the material, the Government desire not a pound of that material, but under this power it can suspend the erection of that building in my city, or your city, for the sole purpose of driving those men out of employment and seeking to compel them voluntarily to seek employment elsewhere."

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"Mr. Sherley: * * What the Committee had undertaken to do is to give to the President the powers that may be necessary in order to quickly build ships, for at the present time there is no matter so important for the successful termination of the war, as the supplying of tonnage as far as it can possibly be supplied for the transportation of food, of men and of munitions across the ocean, and it is a brave man who would want to stand in the way of the powers that may be necessary for that purpose. It may be desirable to modify paragraph (b) by substituting the word 'necessary' for the word 'utilized', found in the last part of the paragraph, so that it would read: '(b). To modify, cancel, requisition or suspend the performance of any contract now in force or hereafter made for the building, production or purchase of ships or material or any contract now existing or hereafter made for any purpose, which requires in the execution thereof labor or material that may be necessary for shipbuilding.' The only effect of that would be to make further evident and apparent that the purpose of taking over or suspending or modifying a contract is because the performance of that contract necessarily interferes with the doing of something, in this instance the building of ships necessary for the prosecution of the war."

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"Mr. Dempsey: Now, I say that is not a reasonable construction of this statute, and that the primary rule of construction always is that it shall be reasonable, and I say, moreover, that it not only is not a reasonable construction of the contract, but, I say, it is not

in accord with the language which is actually used. (The language of paragraph (b) is then repeated). Now, you grant power to modify or suspend any contract which requires labor or materials. What kind of labor or materials. That which may be utilized for shipbuilding. * * * Now, what that means, and what any court in the world would construe it to mean is simply this, that if a plant is using material and labor for some other purpose and that plant and that labor may be utilized for shipbuilding, then the President under this section would have the right instead of allowing them to complete the labor which they have in hand, and which is not useful for this great purpose which the Nation has in view, to go in and say, 'We will utilize this labor and this material and instead of building a store or a house, we will use it for the purpose of shipbuilding.' That is all it means."